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MILITARY OBJECTIVE AND COLLATERAL DAMAGE: THEIR DYNAMICS AND RELATIONSHIP

A Thesis Presented to The Judge Advocate General's School
United States Army in partial satisfaction of the requirements
for the Degree of Master of Laws (LL.M.) in Military Law

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, the Department of Defense, or any other governmental agency.

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MILITARY OBJECTIVE AND COLLATERAL DAMAGE: THEIR DYNAMICS AND RELATIONSHIP

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MILITARY OBJECTIVE AND COLLATERAL DAMAGE: THEIR DYNAMICS AND RELATIONSHIP

ABSTRACT: The two most critical aspects of targeting are the concepts of military objective and collateral damage i.e. incidental loss of civilian life, injury to civilians and damage to civilian objects. The conventional international law definition of military objective is set out in the 1977 Protocol I to the 1949 Geneva Conventions (Protocol I) at Article 52 (2). That definition has also become the complete customary international law definition of military objective. The conventional international law definition of collateral damage and the concept of proportionality of which collateral damage is a part is found in Protocol I at Articles 51 (5) (b), 57 (2) (a) (iii) and 57 (2) (b). For all practical purposes, the customary international law definition of proportionality is the same as the conventional definition. The concepts of military objective and collateral damage (and thus proportionality) are linked by the common element of "military advantage". However, for a variety of reasons that linkage is somewhat weak and sporadic. This linkage implies a complementary relationship between these two concepts i.e. as either grows or diminishes so does the other. An examination of a wide range of recent law of war issues, controversies and developments confirms this relationship. The main implication of this linkage is that at least significant military input will be necessary in determinations of military objective, collateral damage and proportionality. The major challenge of this implication is ensuring that the resulting decisions achieve the proper balance in the basic dynamic of the law of armed conflict i.e. satisfy both military and the humanitarian factors neither of which have primacy.

I. Introduction	1
II. Military Objective	8
A. Introduction and History	8
B. Conventional International Law Definition of Military Objective	12
C. Customary International Law Definition of Military Objective	17
III. Collateral Damage / Proportionality	23
A. Introduction and History	23
B. Conventional International Law Rule of Proportionality.....	25
C. Customary International Law Rule of Proportionality.....	38
IV. Relationship of Military Objective to Collateral Damage / Proportionality.....	42
A. Introduction and Alternatives.....	42
B. Inherent Relationship	43
V. Dynamics of Military Objective and Collateral Damage / Proportionality	47
A. Introduction.....	47
B. General Public Concern for Collateral Damage.....	48
C. Difference in Customary and Conventional Definitions of Military Objective.....	49
D. Difference in Customary and Conventional Rules of Proportionality.....	49
E. Civilian Morale.....	50
F. Electrical Systems.....	56
G. Media Outlets.....	63
H. Bridges	70
I. Retreating Forces.....	75
J. Listing Military Objectives	77
K. Partial Abandonment of the Military Connection in Military Objective.....	81
L. Military Objectives in the Context of Explicit War Aims.....	83
M. Addition to the 1981 Conventional Weapons Convention.....	87
N. Miscellaneous Initiatives, Controversies and Recent Law of War Developments	88
O. Summary of Conclusions as to Relationship Revealed by Dynamics	90
VI. Implications of Relationship of Military Objective to Collateral Damage / Proportionality	91
VII. Conclusion.....	105

I. Introduction

Targeting decisions are matters of life and death. In living memory, targeting decisions have cost the lives of hundreds of thousands if not millions of civilians.¹ Even in very recent conflicts, significant numbers of civilians have been killed because of targeting decisions.² Aside from civilian casualties, targeting decisions have affected the most vital interests of the states involved. Targeting decisions have helped determine the course of wars³ and have even figured in ending wars.⁴ Targeting decision-makers considered many factors other than

¹ See, e.g., MAX HASTINGS, *BOMBER COMMAND* 410 (1979) (citing the German Federal Statistic Office computation of 593,000 German civilian casualties of the Allied bomber offensives in the Second World War); HOITO EDOIN, *THE NIGHT TOKYO BURNED* 238 (1987) (estimating that 312,000 to 412,000 Japanese civilians died in a combination of the atomic and conventional bombing of Japan during the Second World War).

² See, e.g., MIDDLE EAST WATCH, *NEEDLESS DEATHS IN THE GULF WAR* 19 (1991) [hereinafter *NEEDLESS DEATHS*] (estimating an upper limit of 2,500-3,000 Iraqi civilian casualties as a direct result of 1991 Coalition air strikes); William A. Arkin, Greenpeace International, *Gulf War Effects and Laws of War Briefing*, For Meeting of Experts on the Protection of the Environment in Time of Armed Conflict, International Committee of the Red Cross (ICRC), Geneva, 27-29 April 1992 (copy on file with author) (giving the same figure for directly caused casualties in that conflict but adding 70,000-90,000 indirectly caused deaths); INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER-YUGOSLAVIA, FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA para. 53 (June 20, 2000) [hereinafter *ICTY COMMITTEE REPORT*] (using a variety of sources to conclude that Yugoslavian civilian casualties of the NATO 1999 bombing were in the range of 500 dead) available at <http://www.un.org/icty/pressreal/nato061300.htm>; Murray Campbell, *Afghanistan Civilian Toll Notably High*, *GLOBE AND MAIL* (Toronto), Jan. 19, 2002, at A11, (citing a Project on Defense Alternatives estimate of 1000-1300 Afghan civilian deaths between Oct. 7, 2001 and Dec. 10, 2001 caused by United States bombing).

³ During the Second World War, the Luftwaffe's 1940 targeting switch from the Royal Air Force's ground organization to London was a "disastrous change of strategy". See Christopher Dowling, *Battle of Britain*, in *DECISIVE BATTLES OF THE TWENTIETH CENTURY* 115, 122 (Noble Frankland & Christopher Dowling eds., 1976). That war altering targeting decision was itself in part prompted by a series of targeting decisions and errors. The Luftwaffe accidentally bombed London on Aug. 24, 1940. This prompted the British to bomb Berlin in reprisal, which caused Hitler to order the bombing of London in counter-reprisal. *Id.*

⁴ The role played by the two atomic bombs dropped on Japanese cities in 1945 in prompting Japan's surrender is controversial. However, "none of the critics of the atomic bomb decisions has been able to demonstrate how the Japanese high command might have been induced to surrender without the *combined* shock of Russia's entry into the war and the use of *two* atomic bombs." RONALD H. SPECTOR, *EAGLE AGAINST THE SUN* 559 (1985). See also J. ROBERT MOSKIN, *MR. TRUMAN'S WAR* 311 (1996) (conceding "the two atomic bombs had changed not a single senior Japanese leader's mind. But the bombs did reinforce Emperor Hirohito's judgment that Japan must sue for peace.").

legal ones. However, the sheer importance of targeting decisions means that even a marginal impact of legal factors is worth consideration.

Furthermore, targeting much below the strategic level has now achieved a vastly higher profile than it had in the past. The media and non-governmental organizations⁵ routinely examine and critique these decisions in detail. Much of the commentary centers on the legal aspects of such targeting. Modern military campaigns often seem crafted around targeting decisions.⁶ The interplay of the media and civilian casualties can now be an important part of the struggle between the contending parties.⁷ Such has been the prominence of these issues that the terminology of targeting has even entered the popular public consciousness.⁸

Two of the most dramatic aspects of targeting are strikes on military objectives and any resulting collateral damage or incidental civilian casualties caused. Grisly images of dead or injured civilians vie with “morbidly spectacular film of PGM strikes”⁹. These phenomenon also are two of the more basic targeting components, that of military objective and that of the

⁵ See, e.g., NEEDLESS DEATHS, *supra* note 2; Arkin, *supra* note 2; AMNESTY INTERNATIONAL REPORT, NATO/FEDERAL REPUBLIC OF YUGOSLAVIA, “COLLATERAL DAMAGE” OR UNLAWFUL KILLINGS, VIOLATIONS OF THE LAWS OF WAR BY NATO DURING OPERATION ALLIED FORCE (2000) [hereinafter COLLATERAL DAMAGE]; HUMAN RIGHTS WATCH REPORT, CIVILIAN DEATHS IN THE NATO AIR CAMPAIGN (2000) [hereinafter CIVILIAN DEATHS].

⁶ Thomas E. Ricks, *Target Approval Delays Irk Air Force Officers*, WASH. POST, Nov. 18, 2001 at A1.

⁷ MICHAEL IGNATIEFF, VIRTUAL WAR 193 (2000); William J. Fenrick, *The Law Applicable to Targeting and Proportionality after Operation Allied Force: A View from the Outside*, 3 Y.B. OF INT’L HUMANITARIAN L. (forthcoming 2000).

⁸ COLLATERAL DAMAGE (Warner Bros. 2002); RULES OF ENGAGEMENT (Paramount Pictures 2000) (being two mainstream recent films using targeting terms in such a manner as to suggest the public is aware of at least some of their implications).

⁹ Michael N. Schmitt, *Bellum Americanum: The U.S. Views of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict*, 19 MICH. J. INT’L L. 1051, 1081. PGM are precision-guided munitions.

incidental civilian losses. The later component, being incidental civilian loss, injury and damage, also known as collateral damage, is one side of the proportionality “equation”. Expected incidental civilian losses (which term will be used interchangeably with collateral damage) are balanced against the anticipated military value of the strike. This balancing (i.e. proportionality) in turn, is one of the major factors in targeting.

Therefore, this paper will examine two specific legal aspects of targeting: the concept of military objective and that component of proportionality known as collateral damage. After outlining both, this thesis will determine if there is any inherent relationship between these two terms. Next, it will explore a series of recent or emerging issues implicating one or both of these targeting components. The objectives in examining these issues are twofold. Firstly, this exploration of these issues may expose any underlying dynamic in each of these terms i.e. is either changing and if so how. Secondly, considering such issues might help reveal any linkage between these two terms. Is there any relationship between military objective and incidental civilian losses? If so, what is the linkage? If one concept expands or contracts what happens to the other? After analyzing these two terms, their relationship and their dynamics, the paper will then explore the implications of any such relationship.

In some regards, these two aspects of targeting are targeting’s very core. While certainly some situations require consideration of other issues,¹⁰ many targeting decisions can be

¹⁰ See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, [hereinafter Protocol I] 1125 U.N.T.S. 3, art. 54 (protecting objects indispensable to the survival of the civilian population), art. 56 (protecting certain works and installations containing dangerous forces).

confined to these two “simple” issues: is the proposed target a military objective and is there a risk of disproportionate collateral damage?¹¹

A recent trend in modern warfare indicates a detailed consideration of military objective and proportionality criteria is particularly useful. Soldiers, sailors and airmen have always had to make many combat decisions in seconds or minutes. Modern warfare is placing even more emphasis on quick decision-making, particularly those decisions related to targeting. There is every indication that the trend toward very rapid targeting decisions will continue or even accelerate.¹² In such an environment, any useful legal rules will have to be simple if they are to be effective.¹³ Those tasked with making or advising on targeting determinations may only have time to consider the most basic of issues. Military objective and collateral damage are such basic issues.

¹¹ Frits Kalshoven, Remarks in a Panel on *Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity*, AM. SOC. INT’L L. PROC. 39, 41 (1992), Christopher Greenwood, *Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict*, in *THE GULF WAR 1990-91* IN INTERNATIONAL AND ENGLISH LAW, 63, 69 (Peter Rowe ed., 1993).

¹² UNITED STATES AIR FORCE, AIR FORCE BASIC DOCTRINE 32 (1997) [hereinafter USAF BASIC DOCTRINE] (setting the goal of being able to “react to a situation and make accurate decisions more rapidly than the enemy” and improve “the speed and quality of our observe-orient-decide-act loop”); Schmitt, *supra* note 9, at 1057 (foreseeing warfare that is “fast-paced, mobile, and highly lethal”), 1062-63 (forecasting “access to on-demand real-time information will allow real-time planning, rather than the current practice of executing plans developed in advance”); Vernon Loeb & Thomas E. Ricks, *I’s and O’s Replacing Bullets in U.S. Arsenal*, WASH. POST, Feb. 2, 2002, at A1 (citing “the real-time value of being able to target rapidly”, “the American approach to combat increasingly focuses on how to get information, move it and act on it quickly.” and “instantaneous targeting”); Bruce Rolfsen, *Air Force Learned Lessons in Kosovo, but Problems Remain*, AIR FORCE TIMES, Feb. 4, 2002, at 15 (citing the United States Air Force goal “of reducing the sensor-to-shooter timeline to fewer than 10 minutes.”).

¹³ USAF BASIC DOCTRINE, *supra* note 12, at 21 (citing simplicity as one of the principles of war i.e. the need to avoid “unnecessary complexity” in military operations); Louise Doswald-Beck, *Implementation of International Humanitarian Law in Future Wars*, 52 NAVAL WAR C. REV., 24, 34 (Winter 1999) (stating “the more complex the rules, the less likely it is that they will be followed accurately.”).

Any in-depth analysis of the law of war requires a determination of the basic purpose and dynamic of this peculiar body of law. Why does it exist? What is its purpose? The purpose of the law of war, also called the law of armed conflict or international humanitarian law, is to balance military necessity and humanitarian concerns. “[T]he law of armed conflict rests upon a judicious balance between military operational needs and humanitarianism”.¹⁴ Military necessity and humanity have been called “primary concepts” underlying the law of armed conflict.¹⁵ Most commentators expressly accept the tension, dynamic or balance between these sometimes opposing needs.¹⁶

Even those who seemingly restrict the law of war’s purpose to the limitation of human suffering implicitly accept that in war a given amount of suffering is inevitable. They recognize that certain military activities are lawful despite the certainty of human suffering,

¹⁴ L. C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 353 (2nd ed. 2000).

¹⁵ Lieutenant Colonel William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV., 91, 93 (1982) (setting out three such concepts being military necessity, humanity and chivalry).

¹⁶ COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, para. 1389 (Y. Sandoz et al. eds., 1987) [hereinafter the ICRC COMMENTARY] (“The law of armed conflict is a compromise based on a balance between military necessity, on the one hand, and the requirements of humanity, on the other.”); PETER ROWE, *DEFENCE: THE LEGAL IMPLICATIONS* 150 (1987) (quoting Professor Draper “The essential balance in the Law of War has probably swung too far in the direction of humanitarianism. Insufficient attention has been paid to the nature of warfare and what commanders are trained to do.”); Françoise J. Hampson, *Means and Methods of Warfare in the Conflict in the Gulf*, in *THE GULF WAR 1990-91 IN INTERNATIONAL AND ENGLISH LAW*, 89, 91 (Peter Rowe ed., 1993); Professor Ove Bring, *Collateral Damage and Military Objectives: A Point of View de lege ferenda after Kosovo*, in *COLLOQUIUM: LEGAL AND ETHICAL LESSONS OF NATO’S KOSOVO CAMPAIGN*, AUG. 8-10, 2001, at 11 (2001) (held at the United States Naval War College, Newport, Rhode Island); Sergey Alexeyevich Egorov, *The Kosovo Crisis and the Law of Armed Conflicts*, 837 INT’L REV. OF THE RED CROSS 183, 188 (2000) (citing as one of the main characteristics of the law of armed conflict “the confrontation between the principle of humanity and that of military expediency.”); Roger Normand & Chris A. F. Jochnick, *The Legitimation of Violence: A Critical Analysis of the Gulf War*, 35 HARV. INT’L L. J. 387, 389 (1994) (citing as the law of war’s goal “a reasonable balancing of military necessity and humanity” in a very skeptical analysis of the current law of armed conflict regime).

even that of civilians.¹⁷ Indeed, the use of the word “limitation” instead of a more absolute term like “elimination” impliedly accepts that humanitarian concerns are not the only ones at play.

Interestingly, the most recent label for this area of law, international humanitarian law, can actually obscure this dynamic.¹⁸ Certainly, this new name is useful in emphasizing the humanitarian aspect of the discipline. It may also assist in obtaining governmental support, soliciting public donations, attracting students and in raising its civilian profile. However, the term risks over emphasizing but one of the pillars upon which the entire edifice of the law of war is built. It may skew analysis of specific issues. This label also invites confusion with the field of human rights law, a related but distinct discipline.¹⁹ In any disciplined analysis, neither principle should be over-emphasized. Some legal debates will be settled by military factors, others by humanitarian considerations. It is legally wrong and intellectually dishonest to accord either principle automatic primacy in interpretation or analysis.

¹⁷ Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, 35 I. L. M. 809 (1996) [hereinafter *Nuclear Weapons Case*]; Doswald-Beck, *supra* note 13, at 25 (setting out the basic purposes of international humanitarian law as “limitation of means and methods of warfare and the protection of persons in the power of hostile authorities, in order to limit the destructiveness and suffering of war.”). *But see* COLLATERAL DAMAGE, *supra* note 5, at 26 (setting out a supposed international law requirement to “maximize the protection of civilians”. This proposition if meant literally is wrong. The purpose of international humanitarian law is to balance two often-conflicting imperatives not maximize one of them. The only real way to maximize protection of civilians is to avoid conflict in the first place.).

¹⁸ W. Hays Parks, *Air War and the Law of War*, 32 AIR FORCE L. REV. 1, 72 n.245 (1990); Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT’L L. 11, 14 (1995).

¹⁹ *Nuclear Weapons Case*, *supra* note 17, para. 25 (finding that that the International Covenant of Civil and Political Rights, a human rights treaty, has limited direct application in armed conflict situations but rather such rights in an armed conflict are decided by reference to armed conflict’s *lex specialis* i.e. the law of war).

Therefore, in this thesis where the law of armed conflict is unclear or requires interpretation or analysis beyond the words at issue, it will use a balancing of the basic principles of military necessity and humanity. However, it is critical to note that military necessity is not an over-ride that can be used to ignore humanitarian factors. Where a rule, whether based on treaty or customary international law, exists it cannot be ignored based on alleged military necessity. Indeed such is the power of these rules that a United States tribunal found "Military necessity or expediency do not justify a violation of the positive rules The rules must be followed even if it results in the loss of a battle or even a war."²⁰

Before commencing examination of these issues, some cautionary words are appropriate. It is logical and probably most productive to examine several recent modern conflicts as they pertain to military objective and collateral damage. This paper will look at the Coalition's efforts in the 1990-91 Gulf War, NATO's 1999 bombing of Serbia/Kosovo and the on-going bombing of Afghanistan, almost exclusively by the United States. There is some danger in focusing only on such conflicts. These wars are perhaps unique on a number of counts. For most of the Coalition (excluding Kuwait) in the Gulf War, for NATO in the Kosovo campaign and for the United States in Afghanistan, these were generally very limited wars. Other types of conflict engaging states' vital interests may result in different lessons and practices. Secondly, the militaries engaged on the Western side in these conflicts were largely those of democratic, developed, technologically sophisticated nations. The primary actor in all three conflicts, the United States, is the world's pre-eminent military,

²⁰ United States v. Wilhelm List, et al. (The Hostage Case), *reprinted in* XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 759, 1256, 1272 (1947-48).

technological and economic power. Again, the lessons and practices of militaries less sophisticated, poorer or from less democratic nations may be dramatically different.

A more basic caution is a call to remember the limits of both professional disciplines engaged by this analysis i.e. the law and the military. In most essentials and despite recent developments, both war and the law remain exceedingly blunt instruments.²¹ “War is a complex and chaotic human endeavor. Human frailty and irrationality shape war’s nature.”²² Rhetoric aside, by any objective measure, modern warfare is still much closer to the cleaver than the scalpel. Likewise the law, even in the most developed of peaceful societies when one might expect human beings to be at their best, is never a perfect solution to guiding and correcting individual or group behavior. Therefore, it behooves the practitioners of both disciplines, the military professional and the international humanitarian lawyer, to keep the limits of both their crafts firmly in mind. Without inviting complacency, there are limits on what either the majesty of the law or military science can reasonably be expected to accomplish.

II. Military Objective

A. Introduction and History

The concept of military objective is critical because without that concept one of the absolute bedrocks of the law of war will not function. That bedrock is the principle of

²¹ See generally, GEOFFREY BEST, HUMANITY IN WARFARE 10-13 (1980).

²² USAF BASIC DOCTRINE, *supra* note 13, at 6.

distinction.²³ Distinction is that rule which demands “[T]he Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”²⁴ Obviously, one cannot confine one’s attacks to military objectives unless one knows what they are.²⁵ Distinction’s importance cannot be over-stated. “[D]istinction provides the main line of defence against methods of barbarism in warfare.”²⁶ It is the “very heart and soul of the law of war”.²⁷ It illustrates the basic law of war dynamic set out earlier. Military targets are engaged thus accommodating military necessity but civilians and their objects are spared thus giving humanity its due.

Given the above, it is somewhat surprising that such a critical concept as military objective was not successfully codified until 1977 in the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I).²⁸ The term itself and the initial attempt to codify it arose with

²³ *Nuclear Weapons Case*, *supra* note 17, para. 78; G.A. Res. 2444, U.N. GAOR, 23rd Sess., Supp. No. 18, at 164, U.N. Doc. A/7218 (1968) para. 1 (c), Dec. 19, 1968, *reprinted in* THE LAWS OF ARMED CONFLICTS 263 (Dietrich Schindler & Jiri Toman eds., 3rd ed. 1988) [hereinafter G.A. Resolution 2444]; G.A. Res. 2675, U.N. GAOR, 25th Sess., Supp. No. 28, at 76, U.N. Doc. A/8028 (1970) para. 2, Dec. 9, 1970, *id.* 267 [hereinafter G.A. Resolution 2675]; ICTY COMMITTEE REPORT, *supra* note 2, para. 29; Parks, *supra* note 18, at 4 (using the equivalent term “discrimination”); Horace B. Robertson, Jr., *The Principle of the Military Objective in the Law of Armed Conflict*, in THE LAW OF MILITARY OPERATIONS 197 (Michael N. Schmitt ed., 1998); Hampson, *supra* note 16, at 89.

²⁴ Protocol I, *supra* note 10, art. 48.

²⁵ ICRC COMMENTARY, *supra* note 16, para. 1994; Greenwood, *supra* note 11, at 71.

²⁶ Professor Yoram Dinstein, *Legitimate Military Objectives Under the Current Jus in Bello*, in COLLOQUIUM: LEGAL AND ETHICAL LESSONS OF NATO’S KOSOVO CAMPAIGN, AUG. 8-10, 2001, at 41 (2001) (held at the United States Naval War College, Newport, Rhode Island).

²⁷ Hays Parks, *The Protection of Civilians from Air Warfare*, 27 ISR. Y.B. ON HUM. RTS. 65, 72 (1998).

²⁸ Protocol I, *supra* note 10, art. 52 (2) (stating in part “military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial

the 1922-1923 Hague Rules of Air Warfare (1923 Hague Air Rules).²⁹ However, those rules as such were never adopted in any treaty. Nevertheless, as Horace Robertson recounts in his excellent article on military objective, the 1923 Hague Air Rules eventually bore fruit in Protocol I. The International Committee of the Red Cross (ICRC) 1956 Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War (1956 ICRC Draft Rules)³⁰, a further 1965 ICRC Vienna conference, a 1968 Teheran International Conference on Human Rights, 1968 and 1970 United Nations General Assembly resolutions³¹ and a resolution from a 1969 Edinburgh meeting of the Institute of International Law³² all further developed the original 1923 formulation or concept.

This lack of an agreed upon definition of military objective before 1977 is perhaps explained by the context of warfare prevalent before the Great War. In the much simpler age of the nineteenth century, responsible military men simply knew which targets were lawful. Largely, they directed their attacks against the obvious combatants and military machinery arrayed against them or on occasion those few civilian objectives sanctioned by long-usage

destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”).

²⁹ Robertson, *supra* note 23, at 199; Hague Rules of Air Warfare, *reprinted in* THE LAWS OF ARMED CONFLICTS 207 (Dietrich Schindler & Jiri Toman, eds., 3rd ed. 1988) [hereinafter the 1923 Hague Air Rules].

³⁰ Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, International Committee of the Red Cross 1956, *reprinted in* THE LAWS OF ARMED CONFLICTS 251 (Dietrich Schindler & Jiri Toman, eds., 3rd ed. 1988). The annex referred to in Article 7 of the 1956 ICRC Draft Rules is reprinted in the ICRC COMMENTARY, *supra* note 16, para. 2002 n.3. The term 1956 ICRC Draft Rules used hereafter in this thesis refers to the annex to those rules.

³¹ G.A. Resolution 2444, *supra* note 23; G.A. Resolution 2675, *supra* note 23.

³² Robertson, *supra* note 23.

in cases such as siege warfare.³³ The limited range and “line of sight” nature of the weapons made distinction problems much simpler.

Armed forces fought in two dimensions only and the civilian population and its infrastructure was usually relatively safe behind military or naval forces of lesser or greater strength. Destruction was generally confined to the narrow strip where the opposing forces met. Battles were seldom fought in built up areas.³⁴ The role of cities was generally confined to providing the setting for victory parades. With luck, these would be for the inhabitants’ armies. An example of the assumption of this purely military context is the Declaration of St. Petersburg of 1868 that stated, “the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy.”³⁵ This was more or less sufficient for its time.

With the total wars of the twentieth century, the disadvantages of a lack of a definition of military objective became increasingly obvious. The Great War and the birth of air power clearly pointed out new dangers. Destruction by dirigible and long-range bomber

³³ Fenrick, *supra* note 15, at 114 (using the Second World War example of the siege of Leningrad to conclude that before Protocol I “it would appear to have been legitimate to direct fire at the civilian population in order to keep them within the besieged area.”); GREEN, *supra* note 14, at 27 (describing the special rules of medieval siege warfare).

³⁴ Before the Great War, decisive battles were generally fought in relatively open terrain. Sieges were difficult, lengthy and uncertain enterprises. As such, they were to be avoided. *See e.g.*, JOHN KEEGAN, *THE FACE OF BATTLE* (1976) (taking three representative battles being Agincourt, Waterloo and The Somme, none of which were fought in built up areas).

³⁵ Declaration of St. Petersburg, 1868, *reprinted in* THE LAWS OF ARMED CONFLICT 101-02 (Dietrich Schindler & Jiri Toman eds., 3rd ed. 1988).

commenced albeit in what turned out to be a mere foreshadowing.³⁶ Of course, the threat implied by the Great War was more than realized in the Second World War. Many nations carried out massive attacks on virtually entire countries in Europe and Asia. The effect of many of these attacks appears to have been indiscriminate devastation. This trauma was the incentive for the adoption of many of the rules in Protocol I in 1977 including that defining military objective.

B. Conventional International Law Definition of Military Objective

Military objectives are defined in Protocol I Article 52 (2) as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” This definition is a two-stage test. The objective in question must simultaneously meet both the following criteria: its nature, location, purpose or use must make an effective contribution to military action; and its total or partial destruction, capture or neutralization, in the circumstances ruling at the time must offer a definite military advantage.³⁷ Note that this definition is limited to objects only i.e. it does not deal with armed forces personnel. However, there is no doubt such personnel are

³⁶ Parks, *supra* note 18, at 20 n.81 (listing an extensive series of works describing this early period in air power).

³⁷ ICRC COMMENTARY, *supra* note 16, para. 2018; MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS 323 (1982).

legitimate targets and absent being *hors de combat* due to injury, illness or surrender may be attacked at any time.³⁸

The “nature” of the objects set out in the article refers to those things used directly by armed forces e.g. weapons, military vehicles, barracks, fortifications, military headquarters etc.³⁹ “Location” refers to a geographic site of special military importance. Such areas inherently have no military value but in the specific circumstances ruling at the time, they have become militarily critical.⁴⁰ Examples of such areas might include a mountain pass, a ford in a river or other “specific area of land”.⁴¹ “Purpose” refers to the intended future use of an object.⁴² Thus, trucks in a civilian factory in a country at war, which is acquiring a substantial number of such vehicles for its armed forces, are legitimate military objectives despite the fact they belong to the civilian factory owner. “Use” refers to the objects’ present function aside from its nature.⁴³ Thus, if a hotel is being used to house soldiers or a military headquarters it is a military objective.⁴⁴ Likewise, use of Paris taxis by the French in the opening stages of the Great War to transport troops to the front is another example of how current usage can bring normally civilian objects within the ambit of military objective.

³⁸ ICRC COMMENTARY, *supra* note 16, paras. 1951, 2017.

³⁹ *Id.* para. 2020.

⁴⁰ *Id.* para. 2021.

⁴¹ OFFICE OF THE JUDGE ADVOCATE GENERAL, CANADIAN FORCES, THE LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVEL 4-1 (1999).

⁴² ICRC COMMENTARY, *supra* note 16, para. 2022.

⁴³ *Id.*

⁴⁴ *Id.*

The object under consideration must also “make an effective contribution to military action.” Even if a bridge might normally be a military objective,⁴⁵ a bridge in a very remote area far from the military confrontation is unlikely to make an effective contribution to the military action. However, the contribution of an object to military action need not directly relate to combat activity. Thus, if a military commander had to destroy some houses to permit large armored vehicles to transit a village with narrow streets, the destruction of those houses may be legitimate.

Additionally, the destruction, capture or neutralization must offer a *definite* military advantage i.e. the military advantage must be “concrete and perceptible.”⁴⁶ The word “definite” is a word of limitation meaning the advantage cannot be merely hypothetical or speculative.⁴⁷ During negotiations, this adjective was the subject of extensive discussion with the terms “distinct”, “clear”, “immediate”, “obvious”, “specific” and “substantial” being considered but rejected for no readily apparent reasons.⁴⁸

A further important consideration in the conventional definition of military objective is the temporal requirement. The destruction, capture or neutralization must offer the requisite definite military advantage “in the circumstances ruling at the time.”⁴⁹ Clearly, any competent military commander considers the future and its possibilities. These are legitimate

⁴⁵ See *infra* Part V.H.

⁴⁶ BOTHE, *supra* note 37, at 326.

⁴⁷ *Id.*

⁴⁸ *Id.* at 325-26.

⁴⁹ Protocol I, *supra* note 10, art. 52 (2).

military factors. The earlier reference to the purpose of an object being its intended future usage is an example of how such potentialities are accommodated by the law of war. However, there is limit to how remote the future possibilities can be and still render the object a legitimate military objective. Also, there are some situations in which certain previously legal targets can cease to be valid military objectives. Targets and target lists must be re-examined periodically to ensure those objects have retained the characteristics that rendered them lawful military objectives initially. The military situation may have changed in these regards. Even if bridges are normally legitimate military objectives, if the area in question is suffering a long-term drought with no relief expected and all the riverbeds are dry, it is unlikely the area's bridges would be legitimate targets. This may change if the war is expected to be a long one and the upcoming monsoon season could reasonably be expected to restore the utility of the bridges.

In order to properly judge if any given object is a military objective, it is important to realize that it is not at the stage of determining military objective status that any balancing of outside factors is done. This definitional phase is conceptually distinct from the proportionality balancing. Protocol I Article 52 (2) "does not deal with the question of collateral damage."⁵⁰ Thus, the determination of military objective is a threshold issue only. If the preceding criteria are met as to effective contribution to military action and destruction

⁵⁰ BOTHE, *supra* note 37, at 322.

etc. offering a definite military advantage then the object is a military objective. Military objective determination simply requires that a certain standard be met.⁵¹

If that standard is not met then the object is, in law, a civilian object and may not be attacked. This exempt status is effected by Protocol I Article 52 (1), which provides “Civilian objects are all objects which are not military objectives as defined in paragraph 2.” A further treaty presumption as to civilian status for objects of normally purely civilian usage is set out in Article 52 (3) which states “In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.” This presumption does not apply to dual military-civilian usage objects.⁵²

Drafters of the above standard of military objective intended military personnel to be able to use this standard in combat to guide their decision-making. Its guidance is valuable but commentators recognize that it will not always be easy to apply.⁵³ It contains many subjective elements. Certainly, no “bright line rule”⁵⁴ is provided nor is there a “fixed borderline”⁵⁵ between civilian and military objectives. Not all determinations will be

⁵¹ Françoise J. Hampson, Remarks in a Panel on *Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity*, AM. SOC. INT’L L. PROC. 39, 49 (1992).

⁵² BOTHE, *supra* note 37, at 326.

⁵³ ICRC COMMENTARY, *supra* note 16, para. 2016.

⁵⁴ Dieter Fleck, *Strategic Bombing and the Definition of Military Objectives*, 27 ISR. Y.B. ON HUM. RTS. 41, 47 (1998).

⁵⁵ A. Randelzhofer, *Civilian Objects*, 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 603, 604 (R. Bernhardt ed., 1992).

obvious. Decision-makers must exercise discretion and caution. Thus, the onus on these soldiers, sailors and air personnel is a heavy one.

However, it is not an unreasonable burden.⁵⁶ The standards by which military personnel with these duties will be judged are those of simple reasonableness and honesty.⁵⁷ Aside from the law, similar dilemmas and duties with equal levels of difficulty are imposed on military professionals every day by their internal requirements to instill weapons discipline, maintain order, prevent wastage of critical resources such as ammunition and a myriad of other responsibilities. Effectively, the law of war only requires military personnel to fight with the same restraint and caution they would use if they were recapturing their own village and liberating their own townspeople.

C. Customary International Law Definition of Military Objective

The purpose in sketching out the primary debate concerning the customary international law definition of military objective is not to settle this controversy. That debate centers on whether the customary international law definition is more expansive than is set out in Protocol I. Rather, the purpose in setting out the controversy is to derive from it an indication as to whether the concept of military objective is changing i.e. what does this debate tell us about the concept of military objective.

⁵⁶ BOTHE, *supra* note 37, at 326.

⁵⁷ *Id.*

“Customary international law is that law which has evolved from the practice or customs of states.”⁵⁸ It results “from a general and consistent practice of states followed by them from a sense of legal obligation.”⁵⁹ This later element is referred to as *opinio juris*. It is in this manner that international law originally developed. It and conventional international law, i.e. that international law derived from treaties, are the two main sources of international law. Customary international law is a mechanism by which a state that has not ratified a treaty may nevertheless find itself bound by certain international legal norms. Thus, it is this source of international law that provides the definition of military objective for those few countries that are not directly bound by Protocol I.⁶⁰

Based on the requirements for the formation of customary international law as set out above, the definition of military objective found in Protocol I is now also the conventional international law definition binding on even non-parties to Protocol I. Most international legal scholars agree. Non-American commentators are convincingly unanimous.⁶¹ A

⁵⁸ MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 21 (1990).

⁵⁹ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102 (2).

⁶⁰ International Committee of the Red Cross, *International Humanitarian Law*, at <http://www.icrc.org/icrceng> (last visited 22 Jan. 2002) [hereinafter ICRC Web-site] (listing state parties and signatories to the Geneva Conventions and Additional Protocols and indicating that as of Dec. 3, 2001, 159 countries are bound by Protocol I and 30 are not).

⁶¹ Greenwood, *supra* note 11, at 75, 88 (stating “[T]he definition of a military objective in Article 52 (2) was accepted as declaratory of custom during the Gulf conflict” and “The definition of a military objective in Article 52 (2) is generally regarded as declaratory of customary law.” respectively); Kalshoven, *supra* note 11, at 43 (referring to Protocol I art. 52(2), states “this provision is widely regarded as proper law, both within and outside the United States”); Fenrick, *supra* note 7, (stating “the Protocol I definition of military objective is the definition generally accepted today.”); Françoise J. Hampson, Remarks in a Panel on *Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity*, AM. SOC. INT’L L. PROC. 39, 50 (1992) (stating “The definition of a military objective found in Protocol I seems to be recognized as representing customary international law.”); Bring, *supra* note 16, at 2 (stating “The Protocol’s definition of military objectives has often been perceived as a codification of traditional customary law ... This perception is probably correct”).

representative statement in this regard is that of Professor Yoram Dinstein, who while not always enthusiastic about Protocol I,⁶² states, "There is no doubt that, irrespective of objections to sundry other stipulations of Protocol I, 'the principle of the military objective has become a part of customary international law for armed conflict' whether on land, at sea or in the air."⁶³ A nuance to this unanimous chorus is provided by Professor Fausto Pocar, a Judge for the International Criminal Tribunal for the former Yugoslavia (ICTY). While he concludes that Article 52 (2) encapsulates existing principles of customary international law, he opines that there is still room for interpretation and clarification of the terms used in Article 52 (2).⁶⁴

Also telling is the work of the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia for the Prosecutor for the International Criminal Tribunal for the former Yugoslavia (ICTY Committee). The ICTY Committee in its final report of 8 June 2000, stated: "The most widely accepted definition of 'military objective' is that found in Article 52 of Additional Protocol I."⁶⁵ This committee was examining a bombing campaign in which American aircraft carried out the majority of

⁶² Professor Yoram Dinstein, *Comments on Protocol I*, 320 INT'L REV. OF THE RED CROSS, 515, 515 (1997) (stating "And from the viewpoint of implementation, assessed in the light of 20 years of experience, it is evident that the Protocol has been a failure.").

⁶³ Dinstein, *supra* note 26, at 1 (citation to Robertson, *supra* note 23 omitted).

⁶⁴ Professor Fausto Pocar, *To What Extent is Protocol I Customary International Law?*, in COLLOQUIUM: LEGAL AND ETHICAL LESSONS OF NATO'S KOSOVO CAMPAIGN, AUG. 8-10, 2001, at 8 (2001) (held at the United States Naval War College, Newport, Rhode Island).

⁶⁵ ICTY COMMITTEE REPORT, *supra* note 2, para. 35, *see also* para. 42.

missions.⁶⁶ It is telling that the United States does not appear to have objected to having its actions assessed against this standard.

Many American international lawyers and sources agree that this definition either was or has become customary international law.⁶⁷ In 1987 one said, "The definition of military objectives in article 52 has already been incorporated in some military manuals, as well as in treaties other than the protocol; it almost certainly represents customary international law."⁶⁸ Several are of the same opinion as Professor Pocar that Protocol I Article 52(2) accurately states the principles of customary law but disagreement as to how they are spelled out remains.⁶⁹

A few American commentators take a different view. They hold that the customary international law definition of military objective encompasses more than is set out in Protocol I. The Protocol I definition is felt to be too restrictive.⁷⁰ The primary addition

⁶⁶ U.S. DEP'T OF DEFENSE, REPORT TO CONGRESS, KOSOVO/OPERATION ALLIED FORCE AFTER-ACTION REPORT 78 (31 Jan. 2000) (stating that U.S. NATO allies flew about 39% of the sorties during Operation Allied Force).

⁶⁷ Robertson, *supra* note 23, at 204; Colonel Charles J. Dunlap, Jr., *The End of Innocence: Rethinking Noncombatancy in the Post-Kosovo Era*, STRATEGIC REVIEW 9, 13 n.21 (Summer 2000) (accepting that the Protocol I definition of military objective is "considered part of customary international law").

⁶⁸ Burrus M. Carnahan, Remarks in a Panel on *Customary Law and Additional Protocol I to the Geneva Conventions for Protection of War Victims: Future Directions in Light of the U.S. Decision not to Ratify*, AM. SOC. INT'L L. PROC. 26, 37 (1987); Lieutenant Colonel Burrus M. Carnahan, Remarks in a Panel on *Customary International Law Relative to the Conduct of Hostilities and the Protection of the Civilian Population in International Armed Conflict*, 2:415 AM. U. J. INT'L L. & POL'Y, 497, 509 (1987) (making a statement to the same effect).

⁶⁹ See e.g., Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L. J. 143, para. 13 (1999).

⁷⁰ Major Jeanne M. Meyer, *Tearing Down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine*, 51 A.F. L. Rev. 143 (2001) (forthcoming 2001) (arguing that Protocol I Article 52 (2)'s definition of military objective is, or is being interpreted in a manner, inconsistent with the customary international law definition of military objective).

proposed to the objects legitimately subject to attack seems to be those that go to a “war sustaining capability”.⁷¹ This position seems to have arisen within the last ten years or so. In 1995, wording to reflect this expanded definition was added to the most recent American military manual to be published, *The Commander’s Handbook on the Law of Naval Operations (The Commander’s Handbook)*.⁷²

This matter is settled by the initial position taken by the United States at around the time of the negotiations of Protocol I and in the decade thereafter. In 1976 before Protocol I was signed, the United States Air Force defined military objectives in virtually the same words as Protocol I Article 52 (2).⁷³ In that same year, the United States Army adopted Protocol I’s definition of military objective verbatim.⁷⁴ Further, in 1987, Michael J. Matheson, Deputy Legal Advisor with the United States Department of State, spoke expressly “on the United States position concerning the relation of customary international law to the 1977 Protocols Additional to the 1949 Geneva Conventions.”⁷⁵ He dealt with American objections to various portions of Protocol I at some length. There was no

⁷¹ See *id.*

⁷² U.S. DEP’T OF NAVY, THE COMMANDERS HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 8.1.1 (1995) [hereinafter COMMANDERS HANDBOOK]; see also U.S. DEP’T OF NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDERS HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 8.1.1 (1997); see Schmitt, *supra* note 9, at 1076 for a concise and helpful outline of this issue. The United States Dep’t of Defense is planning to publish an all services law of war manual. The date of issue is unknown. This publication should settle what appears to be a disagreement between the latest Navy manual which expands the Protocol I definition of military objective and the earlier Air Force and Army manuals which take the Protocol I definition of military objective as a complete encapsulation of the customary international law definition of military objective.

⁷³ U.S. DEP’T OF AIR FORCE, PAM. 110-31, INTERNATIONAL LAW – THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS para. 5-3 (b)(1) (19 Nov. 1976).

⁷⁴ U.S. DEP’T OF ARMY, PAM. 27-10, THE LAW OF LAND WARFARE Change 1 para. 40 (c) (July 1956 with 15 July 1976 Change No. 1).

⁷⁵ Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419, 419.

objection to the definition of military objective. Rather he stated “the United States has no great concern over the new definition of ‘military objective’ set forth in article 52 (2) of Protocol I.”⁷⁶

However, what is the legal effect of what appear to be second thoughts i.e. the recent effort evidenced by the expanded definition of military objective in the United States Navy manual? *The Commander’s Handbook* adds significantly to the Protocol I definition of military objective.⁷⁷ The earlier United States Air Force and Army manuals had accepted Protocol I Article 52 (2)’s definition as a comprehensive statement of the customary international law definition of military objective. A judgment of the International Court of Justice (ICJ) seems to provide a logical and authoritative answer, albeit concerning a different treaty. If “an interested State, which was not a party to the Convention, formally recorded its view that the Convention was an expression of generally applicable international law. This view being perfectly well founded, that State is not now in a position to escape the authority of the Convention.”⁷⁸ Thus, the United States is bound by its earlier acceptance of the Protocol I definition of military objective as the complete customary international law definition.

⁷⁶ *Id.* at 436.

⁷⁷ COMMANDERS HANDBOOK, *supra* note 72, § 8.1.1 (adding the concept of “war-sustaining capability” to the Protocol I definition of military objective).

⁷⁸ North Sea Continental Shelf Cases (F. R. G. v. Den.; F. R. G. v. Neth.), 1969 I. C. J. REP. 4, dissenting opinion of Judge *ad hoc* Sørensen, reprinted in D. J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 39 (4th ed. 1991). The reasons for which this opinion was a dissent do not affect the statement cited.

Professor Dinstein is of the same view, albeit on substantive grounds. He says “[A]n American attempt ... to substitute the words ‘military action’ by the idiom ‘war-fighting or war-sustaining capability’ goes too far. The ‘war-fighting’ limb can pass muster, since it may be looked upon as equivalent to military action. But the ‘war-sustaining’ portion is too broad.”⁷⁹

III. Collateral Damage / Proportionality

A. Introduction and History

As mentioned in the introduction, incidental civilian losses is one of the two terms this thesis examines. In turn, such losses are one of the two components in the balancing calculus mandated by the concept of proportionality. Incidental civilian losses must generally be examined in the context of the proportionality equation of which it is a component. Proportionality is the legal rule that requires that there be a acceptable relationship between the military advantage anticipated from a military action and the incidental harm done to civilians and civilian property in the course of that action.⁸⁰ For ease of reference, this paper will hereafter refer simply to “civilian losses” which term encompasses “loss of civilian life,

⁷⁹ Dinstein, *supra* note 26, at 8; see also Frits Kalshoven, *Noncombatant Persons: A Comment to Chapter 11 of the Commander's Handbook on the Law of Naval Operations*, 64 INT'L L. STUD. 300, 310 (warning that “To add ‘war-sustaining effort’ is going too far ... as this might easily be interpreted to encompass virtually every activity in the enemy country.”).

⁸⁰ See e.g., William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offence*, 7 DUKE J. COMP. & INT'L L. 539, 545.

injury to civilians, damage to civilian objects, or a combination thereof”⁸¹ unless the context or express wording dictates otherwise.

It is critical to note that proportionality never permits a deliberate attack on civilians. In addition, this concept is an excellent illustration of the basic dynamic underlying the law of war. Proportionality balances military necessity and humanity.⁸² It permits attacks on military objectives even where incidental civilian losses are inevitable, but only where such losses are not disproportionate to the military advantage anticipated.

Historically, the concept of proportionality is somewhat unclear and has certainly not been uniformly applied.⁸³ It was not expressly codified until Protocol I.⁸⁴ However, one can find at least elements of the concept of proportionality in earlier law of war authorities. For example, the 1923 Hague Air Rules at Article 24 (4) state “[T]he bombardment of cities, towns, and villages, dwellings or buildings is legitimate provided there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population.”⁸⁵ Similarly in 1933, James M. Spaight, a noted British authority on the law of air warfare, wrote that if an aerial attack upon a densely populated area or similar concentration of

⁸¹ Protocol I, *supra* note 10, arts. 51 (5) (b), 57 (2) (a) (iii), 57 (2) (b).

⁸² A.V.P. ROGERS, LAW ON THE BATTLEFIELD 14 (1996); Doswald-Beck, *supra* note 13, at 28 (stating “The law of proportionality ... is an excellent example of compromise between military and humanitarian needs”); Fenrick, *supra* note 15, at 94.

⁸³ Parks, *supra* note 27, at 90-98.

⁸⁴ Fenrick, *supra* note 15, at 95.

⁸⁵ 1923 Hague Air Rules, *supra* note 29.

civilians was “likely to involve a disastrous loss of non-combatant life, aircraft are bound to abstain from bombardment.”⁸⁶ That having been said, the application of this concept during the Second World War was often hard to discern, especially as it affected enemy civilians.⁸⁷

B. Conventional International Law Rule of Proportionality

The conventional rule concerning proportionality in the law of armed conflict is set out three times in Protocol I at Articles 51 (5) (b), 57 (2) (a) (iii) and 57 (2) (b). In all three, a disproportionate attack is defined to be an “attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

While civilian losses are to be absolutely avoided if all possible,⁸⁸ it is recognized that this will often not be possible. “Not all civilian deaths in wartime are unlawful.”⁸⁹ The general immunity that civilians enjoy is not absolute.⁹⁰ Even critics of military action concede the law of war does not prohibit all civilian casualties.⁹¹

⁸⁶ J. M. SPAIGHT, *AIR POWER AND WAR RIGHTS* 210 (2nd ed. 1933).

⁸⁷ Parks, *supra* note 27, at 95.

⁸⁸ Protocol I, *supra* note 10, art. 57 (2) (ii).

⁸⁹ COLLATERAL DAMAGE, *supra* note 5, at 6.

⁹⁰ The general protection offered by Protocol I art. 51(1), *supra* note 10 is just that, general. It provides in part, “The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.” Incidental civilian casualties are clearly contemplated by the three repeated proportionality formulations, *see* sources cited *supra* note 81, more specifically by art. 57 (2) (ii) wherein

The rule against disproportionate incidental civilian casualties is one of the most controversial areas in the law of war, at least in the public realm. The rule is replete with difficulties. Although this section only deals with the conventional rule on proportionality, the application difficulties outlined pertain equally to any customary international law rule concerning proportionality.

The major practical and conceptual difficulty with this rule is that it requires that two very unlike values to be weighed,⁹² balanced,⁹³ and a judgment rendered as to which of those unlike values is to be preferred. The first value is the composite of the loss of civilian life, civilian injury and damage to civilian objects expected from the attack. The second value is the concrete and direct military advantage anticipated from the target's destruction. There simply is no objective method to evaluate two such disparate notions. Obviously, any such weighing has to be extremely subjective,⁹⁴ which aspect will be considered further in a later section.

attackers are required to take all feasible precautions "with a view to avoiding, *and in any event minimizing*" civilian losses.

⁹¹ NEEDLESS DEATHS, *supra* note 2, at 42-47 (accepting implicitly the legality of at least some incidental civilian casualties in some circumstances.); Normand & Jochnick, *supra* note 16, at 2, 11 (citing "a reasonable balancing of military necessity and humanity" as the desired goal of the law of armed conflict and that this law "limits the right of belligerents to massacre civilians under an overly broad definition of military necessity.", both of which imply an acceptance of some civilian casualties in some circumstances).

⁹² ICRC COMMENTARY, *supra* note 16, para. 2208; Schmitt, *supra* note 69, para. 16.

⁹³ Professor Yoram Dinstein, *The Laws of Air, Missile and Nuclear Warfare* 27 ISR. Y.B. HUM. RTS. 1, 15.

⁹⁴ *Id.* at 8; NEEDLESS DEATHS, *supra* note 2, at 43; Doswald-Beck, *supra* note 13, at 34; ICRC COMMENTARY, *supra* note 16, para. 2208.

In addition to the major difficulty set out above, at least three further sub-questions arise in proportionality dilemmas.⁹⁵ William Fenrick sets out the all four questions, the first being the dilemma of unlike values set out above:

- 1) What are the relative values to be assigned to the military advantage gained and the injury to non-combatants and or the damage to civilian objects?
- 2) What do you include or exclude in totaling your sums?
- 3) What is the standard of measurement in time and space? and
- 4) To what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects?⁹⁶

The dilemma posed by the first question has already been outlined. The second question can relate to a number of factors but the most obvious ones relate to how incidental losses i.e. collateral damage is calculated. Hays Parks demonstrates that not all is what it might at first seem in tabulating incidental losses.⁹⁷ In fact, responsibility for collateral damage is often shared between the attacker and the defender.⁹⁸ Many questions about responsibility for incidental civilian losses arise. A sample of those raised by Hays Parks illustrate the inherent complexity of this issue. Do you include civilians killed by their own anti-aircraft forces e.g. by falling debris? Do you count civilians killed by bombs that are forced off course by miscellaneous defensive measures? Do you include those deliberately

⁹⁵ ICTY COMMITTEE REPORT, *supra* note 2, para. 49; Fenrick, *supra* note 80, at 546; Fenrick, *supra* note 7.

⁹⁶ Fenrick, *supra* note 80, at 546; Fenrick, *supra* note 7; ICTY COMMITTEE REPORT, *supra* note 2, para. 49. The issue of time and space is dealt with at *infra* pp. 30, 37-38.

⁹⁷ Parks, *supra* note 18, at 194-97 (setting out a theoretical scenario in which a substantial number of civilian casualties turn out upon analysis to not be attributable necessarily to the attacker.).

⁹⁸ See Protocol I *supra* note 10, arts. 51 (7), 58; Parks, *supra* note 18, at 153-54.

not evacuated by their own government? Clearly, one cannot call every civilian death after an attack collateral damage. Indeed, to do so would be misleading and potentially dishonest. One cannot assess incidental civilian losses by simply conducting a body count. Such an oversimplification is as superficial as assessing the quality of a hospital by only counting the bodies in its morgue.

There is a further complication in addressing the problem of incidental civilian losses especially when considering the public reaction to such events. It is related to the different nature of the effects balanced by the concept of proportionality. Collateral civilian losses are often concrete, dramatic and emotive. They lend themselves to powerful pictures and strong reactions.⁹⁹ The contrasting value, military advantage, is usually very abstract. It cannot generally be photographed. It tends to have at most a muted emotional impact. Undervaluing expected incidental civilian losses often results in gory pictures. Undervaluing anticipated military advantage usually results in simply a missed targeting opportunity of which the public will likely be unaware.¹⁰⁰ The public is generally going to react much more strongly to collateral damage than to forgone targets. Feeding this asymmetrical public

⁹⁹ Professor Michael Bothe, *Untitled Paper for Targeting Workshop, in COLLOQUIUM: LEGAL AND ETHICAL LESSONS OF NATO'S KOSOVO CAMPAIGN, AUG. 8-10, 2001* (2001) (held at the United States Naval War College, Newport, Rhode Island).

¹⁰⁰ *See contra* Ricks, *supra* note 6. That article started off "As many as 10 times over the last six weeks, the Air Force believed it had top Taliban and al Qaeda members in its cross hairs but was unable to receive clearance to fire in time to hit them." Such missed opportunities are seldom made public.

response to such issues are the often unrealistic public expectations when it comes to the accuracy of PGM.¹⁰¹ The public expects not only smart weapons but infallible weapons.¹⁰²

William Fenrick's third question refers to the measure of time firstly as it pertains to the military advantage anticipated.¹⁰³ When balancing civilian losses should the military commander be considering the military advantage of the destroyed bridge over the next day? week? month? year? Likewise, over what time are the civilian losses to be calculated? The attacking military commander may be in a very poor position to judge how quickly the enemy can repair the electrical grid for at least emergency purposes. He usually cannot know with any reasonable degree of certainty the enemy's resources, even less the enemy's priorities.

How then is this difficult highly charged concept to be applied? Is it so inherently flawed that it cannot usefully be employed? Not at all. Obviously and despite the mathematical terms used earlier, there is no mathematical formula to balance expected incidental civilian losses and anticipated military advantage. Even less will there be a "proportionometer" to assist commanders and others tasked with these difficult decisions. The military member (and it will be military personnel along with the occasional politician

¹⁰¹ A. P. V. Rogers, *Zero-Casualty Warfare*, 837 INT'L REV. OF THE RED CROSS 165, 169 (stating that the public's shock at images of civilian dead "is probably exacerbated by their unduly high expectations of the accuracy of smart weapons.").

¹⁰² Miro Cernetig, *Civilian Deaths Anger Moderate Muslims*, THE GLOBE AND MAIL (Toronto), Oct. 15, 2001, at A4 (quoting one Pakistani on the U.S. bombing of Afghanistan "How can a laser bomb miss its target and kill poor farmers?" and another "How can their computers make so many mistakes?" both of whom attributed resulting civilian deaths to deliberate targeting of civilians).

¹⁰³ This question has occurred to others. See e.g. ROGERS, *supra* note 82, at 18 (stating "Another problem is whether the humanitarian and military limbs of the proportionality rule must be looked at in the longer or the shorter term.").

who inserts him or herself in the targeting process)¹⁰⁴ will have to make a good faith,¹⁰⁵ honest and competent¹⁰⁶ decision as a “reasonable military commander”.¹⁰⁷ As has been pointed out, such judgments by experienced combat commanders are not likely to be the same as those made by human rights lawyers.¹⁰⁸ Nor should they be. The combat commander has a wide range of responsibilities including, but not limited to, the successful execution of his mission and adherence to the law of armed conflict. So subjective are proportionality decisions that different reasonable experienced combat commanders are likely to differ on occasion.¹⁰⁹

This subjectivity is widely recognized.¹¹⁰ The various enforcement mechanisms related to punishing breaches of the proportionality standard effectively acknowledge this

¹⁰⁴ Peter Rowe, *Kosovo 1999: The Air Campaign – Have the Provisions of Additional Protocol I Withstood the Test?*, 837 INT’L REV. OF THE RED CROSS 147, 157-58 (quoting the British Secretary of State for Defence “I personally approve some of the targets, but for most, I have now delegated the decisions to the operational commanders.”); Press Release, U.S. Dep’t of Defense, Joint Statement on the Kosovo After Action Review, (Oct. 14, 1999), available at http://www.defenselink.mil/news/Oct1999/b10141999_bt478-99.html (last visited 5 Apr. 2002) (stating “For selected categories of targets, for example, targets in downtown Belgrade or targets likely to involve high collateral damage, NATO reserved approval for higher political authorities.”).

¹⁰⁵ NEEDLESS DEATHS, *supra* note 2, at 45; ICRC COMMENTARY, *supra* note 16, para. 1978; Dinstein, *supra* note 93, at 8.

¹⁰⁶ BOTHE, *supra* note 37, at 310.

¹⁰⁷ ICTY COMMITTEE REPORT, *supra* note 2, para. 50.

¹⁰⁸ *Id.*; Fenrick, *supra* note 80, at 5; Fenrick, *supra* note 7.

¹⁰⁹ Greenwood, *supra* note 11, at 78 (citing as an example of professional military differences, the British air commander during the Gulf War declining two targets assigned to him by his U.S. counterparts because in his assessment the risk of collateral damage was too great). Although proportionality decisions are not mathematical, an example using concrete numbers illustrates both the inherent subjectivity and the limits of that subjectivity in proportionality questions. For the destruction of a given military objective, one reasonable military commander may judge that at most 25 incidental civilian deaths was not disproportionate. A second equally reasonable commander may judge that 40 incidental civilian deaths was the upper limit. One probably cannot say that either is wrong. However, both may agree that 400 incidental civilian fatalities caused to destroy that particular target would be disproportionate.

¹¹⁰ ROGERS, *supra* note 82, at 58; Dinstein, *supra* note 93, at 8; NEEDLESS DEATHS, *supra* note 2, at 43.

subjectivity as well. Protocol I Article 85 deals with grave breaches of Protocol I more specifically in sub-article (3) for that of causing excessive civilian losses. Causing excessive civilian losses is made a grave breach but only when committed *willfully* and when death or serious injury result and when committed “*in the knowledge* that such attack will cause excessive loss.”

The same recognition is even stronger for the permanent International Criminal Court (ICC). Causing excessive incidental civilian losses only comes within the jurisdiction of the ICC where such damages are *clearly* excessive in relation to the concrete and direct military advantage anticipated.¹¹¹ The addition of the word “clearly” means evidence of a disproportionate attack is going to have to be very strong before a prosecution in the ICC is warranted. Reinforcing this effect is the ICC’s Finalized Draft Text of the Elements of the Crimes for the war crime of excessive incidental death, injury or damage (Draft Text of the Elements).¹¹² One of the requisite elements for that crime is that “The perpetrator *knew* that the attack would cause” the prohibited degree of loss i.e. clearly excessive collateral damage. Those extra elements in the grave breach portion of Protocol I, the statute of the ICC and its related documents are evidence that the drafters of those instruments recognize that determinations as to proportionality are so subjective that they are only internationally criminalized when such decisions are very obviously wrong. In reality, before any

¹¹¹ Rome Statute of the International Criminal Court, July 17, 1998, art. 8 (b) (iv) as corrected by the *procès-verbaux* of Nov. 10, 1998 and July 12, 1999, Nov. 30, 1999 and May 8, 2000, *reprinted in* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 167, 172 (2001); *See Rogers, supra* note 101, at 180.

¹¹² *United Nations Preparatory Commission for the International Criminal Court, Report of the Preparatory Commission for the International Criminal Court, Addendum, Part II, Finalized Draft Text of the Elements of Crimes art. 8 (2) (b) (iv) War Crime of Excessive Incidental Death, Injury, or Damage (2 Nov. 2000) [hereinafter Draft Text of the Elements].*

commander is prosecuted for a grave breach in this regard, the attack will likely have to be so disproportionate as to amount to a deliberate attack on the civilian population.

Nor will such decisions be reviewed with the benefit of hindsight.¹¹³ Commanders' decisions as to proportionality will be legally judged based on the information those commanders had at the time they had to make those decisions. This accords with a long established principle that in the context of law of war decisions the standard is applied to the facts as they appeared to the commander at the time he or she had to make the decisions.¹¹⁴

The standard set out in Protocol I is clearly prospective i.e. it is intended to serve as a guide to those planning an attack. The expected civilian losses must be compared to the *anticipated* concrete and direct military advantage.¹¹⁵ Such plans are necessarily based on expectations as to how the future will unfold. As such, it is an activity fraught with real uncertainty. Thus, in addition to all its other challenges, proportionality requires a weighing of disparate *future* predicted events.

A further aspect of proportionality is the level of command at which legal responsibility for such decisions is lodged. It is clear that generally such decisions will be made at relatively senior levels. Individual tank commanders and pilots may not have the requisite knowledge to weigh the direct and concrete military advantage anticipated from their small

¹¹³ Hampson, *supra* note 51, at 3.

¹¹⁴ This is the so-called Rendulic Rule derived from the judgment in the *Hostage Case*, *supra* note 20, at 1296-97.

¹¹⁵ Protocol I, *supra* note 10, arts. 51 (5) (b), 57 (2) (a) (iii), 57 (2) (b).

part in the attack.¹¹⁶ They probably will not know everything that is at stake. Indeed Switzerland and Austria indicated during Protocol I negotiations that proportionality decisions could not be made at the junior personnel level but rather at the higher levels of command.¹¹⁷ This level was thought to perhaps be at the division level.¹¹⁸ On the other hand, this is the principle that a private soldier might reasonably be expected to implement to at least delay, pending further instructions, his assigned attack on a building assumed to be manned only by enemy soldiers when he realizes it is also full of school children.

One criticism of the rule of proportionality as it is codified in Protocol I is that it does not allow a commander to factor in the security of his own personnel and force.¹¹⁹ This is mistaken. The proportionality rule as set out in Protocol I is sufficiently flexible to accommodate this concern.¹²⁰ The term military advantage is sufficiently flexible to incorporate the gains and losses expected in any given military operation. Obviously, the advantage of striking virtually any enemy military objective diminishes or even disappears if it comes at the cost of horrendous losses to the attacker.

¹¹⁶ BOTHE, *supra* note 37, at 367; Parks, *supra* note 18, at 176.

¹¹⁷ 3 HOWARD S. LEVIE, PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE 1949 GENEVA CONVENTIONS 332-33 (1980).

¹¹⁸ Fenrick, *supra* note 15, at 108.

¹¹⁹ Parks, *supra* note 18, at 148-49; *see also* Fenrick, *supra* note 80, at 548-49.

¹²⁰ MINISTRY OF DEFENCE, BRITISH DEFENCE DOCTRINE (JWP 0-01) (1996) [hereinafter BRITISH DEFENCE DOCTRINE] (regarding targeting and proportionality stating "[A] commander ... is entitled to take into account factors such as ... risks to his own forces." cited in Rogers, *supra* note 101, at 178). *See also* BOTHE, *supra* note 37, at 324. *Contra* Fenrick, *supra* note 80, at 7 (stating in relation to proportionality "Military casualties incurred by the attacking side are not part of the equations." Fenrick's position ignores the inherent flexibility of the term "military advantage").

Is the rule of proportionality then so elastic, complicated and difficult to apply as to defy effective enforcement of any breach of it? Certainly, the current rule on proportionality has been criticized for its laxness.¹²¹ Can any commander be called to account for large numbers of incidental civilian dead at any level? There are at least two limits on disproportionate civilian losses breaches of which likely will trigger enforcement mechanisms. Firstly, a disproportionate attack may be criminally sanctioned if it results in so much incidental damage as to amount to a deliberate attack on the civilian population. Admittedly, this is not a very stringent standard. Another situation was suggested in an ICTY trial decision. In that case, Judge Cassesse stated:

[I]t may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul *per se* of the loose prescriptions of Articles 57 and 58 (or of the corresponding customary rules). However, in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and lawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardize excessively the lives and assets of civilians, contrary to the demands of humanity.¹²²

¹²¹ Normand & Jochnick, *supra* note 16, at 389 (stating "The laws of war permit virtually any form of military conduct as long as such conduct is directed towards achieving clear military objectives."). Normand and Jochnick's complaint is not directed solely at the rule of proportionality. They make the argument that the current law of war regime in general is unduly balanced in favor of military necessities at the expense of humanitarian obligations.

¹²² Prosecutor v. Kupreskic et al., No. IT-95-16-T para. 526 (Jan. 14, 2000) (Judgment).

Judge Cassesse's suggestion is an obviously logical inference that perhaps goes to the intention or good faith of the commander in question. The inference's rationale is not unlike that behind the common law evidentiary doctrine of "similar acts".¹²³

However, application of this presumption may be problematic in practice. This will be especially so at the strategic and operational level. A variety of factors, including the difficulty in properly defining the scope of the conduct or campaign within which to judge the alleged disproportionate attacks mean the inference cannot be a comprehensive solution to the elastic nature of the rule of proportionality. Nevertheless, there may be sufficiently discrete military operations or campaigns within which to usefully apply this presumption.

Not surprisingly, with such a subjective, emotive and complicated concept, certain errors and misconceptions have arisen. This thesis will deal with three. The first is that the rule of proportionality has application in attacks between military forces. This is wrong. Proportionality's formulations refer only to "incidental loss of *civilian* life, injury to *civilians*, damage to *civilian* objects."¹²⁴ The wording does not refer to military casualties or military losses. Any marginally competent military commander is going to try to bring overwhelming force to bear against the enemy at the decisive point.¹²⁵ Ten against one is good. Fifty

¹²³ 2 WIGMORE, EVIDENCE § 300 (Chadbourn rev. 1979). The chapter title makes the applicable inference clear. That title is "Other Offenses or Similar Acts, as Evidence of Knowledge, Design, or Intent".

¹²⁴ Protocol I, *supra* note 10, arts. 51 (5) (b), 57 (2) (a) (iii), 57 (2) (b) (emphasis added).

¹²⁵ See e.g. USAF BASIC DOCTRINE, *supra* note 13, at 26.

against one is even better. The law of war is not designed to ensure a fair fight.¹²⁶ Warfare is not sport.

The second error is that proportionality is judged "in relation to each individual attack, rather than on a cumulative basis."¹²⁷ This is also wrong. Many nations made their views known in this regard when they ratified Protocol I.¹²⁸ The proper context within which to judge proportionality is "the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not from isolated or particular parts of the attack."¹²⁹ One simple example will illustrate the error of using any narrower interpretation. Assume that only five bridges cross a river in enemy territory. It is vital for the enemy to cross this river but any bridge will suffice and only one bridge is required. Obviously, these bridges may be attacked. However, destroying only one or even four bridges provides virtually no military advantage and any significant incidental civilian losses would be disproportionate when weighed against the military advantage of less than five bridges being demolished. It is only when all five bridges are destroyed that any military advantage results. It is against the advantage from destroying all five bridges that

¹²⁶ Parks, *supra* note 18, at 169.

¹²⁷ Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 407 (stating "It appears from the words 'concrete and direct' that the Protocol requires that proportionality be assessed in relation to each individual attack, rather than on a cumulative basis." The words "concrete and direct" are not so limiting, a concrete and direct military advantage can accrue from a series of attacks on a target set. Indeed, that is often the case. This is consistent with military necessity and the recent state practice of those Protocol I parties that have had to apply that law in armed conflict). Professor Dinstein, citing Gardam makes the same mistake. See Dinstein, *supra* note 93, at 7.

¹²⁸ BOTHE, *supra* note 37, at 365 (relying upon the views of the United Kingdom, the Netherlands, Canada, Germany, Italy and the United States in this regard).

¹²⁹ 1991 Can. T.S. No. 2, at 180 (being Canada's reservation in this regard and representative of the other countries' reservations).

the cumulative incidental civilian losses must be judged. The ICC's Draft Text of the Elements confirms this. That text when referring to the military advantage anticipated from an allegedly disproportionate attack refers to the "concrete and direct *overall* military advantage anticipated."¹³⁰ To emphasize this point, in a related footnote it provides "Such advantage may or may not be temporally or geographically related to the object of the attack."¹³¹ The ICTY Committee likewise held that proportionality concerns "should not necessarily focus exclusively on a specific incident" where only part of an alleged target system was attacked.¹³²

The third error regarding proportionality is that there is an absolute number of civilian deaths beyond which any attack will be disproportionate. This is the implication of the ICRC Commentary, where at Paragraph 1980 it states:

The idea has also been put forward that even if they are very high, civilian losses and damages may be justified if the military advantage at stake is of great importance. This idea is contrary to the fundamental rules of the Protocol; in particular, it conflicts with Article 48 (*Basic rule*) and with paragraphs 1 and 2 of the present Article 51. The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive.¹³³

The word "extensive" is not used in proportionality's definitions.¹³⁴ This ICRC Commentary paragraph implies that the word extensive has some objective or absolute

¹³⁰ *Draft Text of the Elements*, *supra* note 112.

¹³¹ *Id.*

¹³² ICTY COMMITTEE REPORT, *supra* note 2, para. 78.

¹³³ ICRC COMMENTARY, *supra* note 16, para. 1980. Unfortunately, this position in the ICRC COMMENTARY has misled some others. See e.g., CIVILIAN DEATHS, *supra* note 5, at 6.

¹³⁴ Protocol I, *supra* note 10, arts. 51 (5) (b), 57 (2) (a) (iii), 57 (2) (b).

meaning. To the contrary, both the *Compact Oxford English Dictionary*¹³⁵ and the *Random House Webster's Unabridged Dictionary*¹³⁶ reveal the word "extensive" has no such meaning. The former defines extensive in its most relevant portion as "having a wide extent" and "Large in amount". The later defines the same word as "great in amount, number or degree". Neither connotes any absolute or concrete sense. Thus, extensive is no stricter or more objective than the term excessive used to describe ordinary disproportionateness. Extensiveness is equally relative and subjective. Being relative, even extensive incidental civilian losses can only have a meaning if compared to the concrete and direct military advantage anticipated.

Indirectly, this is the implication of the ICJ in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*. When it refused to decide that the use or threat of nuclear weapons was illegal where a state's existence was at issue, it impliedly accepted that when the stakes were high enough a very great number of incidental civilian deaths indeed could be legally acceptable.¹³⁷ Other commentators agree that the ICRC Commentary is wrong in this regard.¹³⁸

C. Customary International Law Rule of Proportionality

¹³⁵ OXFORD UNIVERSITY PRESS, *THE COMPACT OXFORD ENGLISH DICTIONARY* (2nd ed. 1991).

¹³⁶ RANDOM HOUSE, INC., *RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY* (2nd ed. 1997).

¹³⁷ See *Nuclear Weapons Case*, *supra* note 17, paras. 97, 105.

¹³⁸ ROGERS, *supra* note 82, at 18; Kalshoven, *supra* note 11, at 44; Greenwood, *supra* note 11, at 78 (downplaying the significance of that part of the Commentary without expressly disagreeing).

Like the treatment of the customary international law definition of military objective, the purpose of this analysis of the customary international law existence and formulation of the rule of proportionality including its incidental civilian losses component is not to settle any controversy. Such is beyond the limits of this thesis. As with military objective, the main goal is to determine what if anything this debate tells us about the dynamics of proportionality and collateral damage.

The primary debate about proportionality and Protocol I is whether the rule as formulated in Protocol I sets out the customary international law rule on proportionality or not. That there is a rule of proportionality in customary international law is not in real dispute. This possible customary, as opposed to conventional, rule has been phrased in a number of fashions. A judgment of the ICJ stated it as the rule that “even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack.”¹³⁹

Among those who believe that Protocol I sets out the customary rule is Christopher Greenwood, who, after acknowledging the pre-Gulf War debate and contradictory American statements in these regards, finds “The principle of proportionality laid down in Articles 51 (5) (b) and 57 (2) (a) (iii) is generally accepted as part of customary law”¹⁴⁰ Françoise Hampson, Professor Ove Bring, Lieutenant Colonel Corn and Colonel Charles Dunlap

¹³⁹ *Nuclear Weapons Case*, *supra* note 17, dissenting opinion of Judge Higgins, para. 20.

¹⁴⁰ Greenwood, *supra* note 11, at 88.

concur.¹⁴¹ As pointed out by Christopher Greenwood, this was also the position taken in the 1976 change to the United States Department of the Army Field Manual *The Law of Land Warfare* FM 27-10 and the 1989 United States Navy *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*.¹⁴² Again, note the above Army manual version preceded finalization of Protocol I.

The ICTY Committee set out a similar position. It held that “in combat military commanders are required to ... when directing their operations against military objectives, to ensure that the losses to the civilian population and the damage to civilian property are not disproportionate to the concrete and direct military advantage anticipated.”¹⁴³ This wording is so close to that in Protocol I as to amount to the same rule.

As with the definition of military objective, the initial American position on the relationship of Protocol I to the United States' view of proportionality in customary international law was set out in 1987 by Mr. Matheson of the Department of State. He said, “We support the principle ... that attacks not be carried out that would clearly result in collateral civilian casualties disproportionate to the expected military advantage.”¹⁴⁴ In the context of this debate, this statement is somewhat ambiguous. One can argue that the formulation Mr. Matheson used is so close to the Protocol I definition of proportionality as to

¹⁴¹ Hampson, *supra* note 51, at 46; Bring, *supra* note 16, at 4; then Major Corn, *International and Operational Law Note Principle 3: Endeavor to Prevent or Minimize Harm to Civilians*, ARMY LAW., Oct. 1998, at 57; Dunlap, *supra* note 67, at 11.

¹⁴² Greenwood, *supra* note 11, at 76.

¹⁴³ ICTY COMMITTEE REPORT, *supra* note 2, para. 28.

¹⁴⁴ Matheson, *supra* note 75, at 426.

amount to an endorsement of the conventional definition. Alternatively, the fact he bothered to reformulate the conventional proportionality rule, unlike his explicit endorsement of the Protocol I definition of military objective, is some evidence that he was deliberately setting out a somewhat differently worded rule.

At the very least, Mr. Matheson's statement strongly indicates some customary international law rule of proportionality exists. Also supporting the view that the customary international law rule of proportionality exists even if its exact formulation is open to debate is Professor Dinstein. He states "But whatever its correct formulation, the principle of proportionality ... can be viewed by now as an integral part of customary international law."¹⁴⁵ The United States Department of Defense in its Final Report to Congress after the Gulf War said that there was an *uncodified* principle of proportionality in customary international law that "prohibits military action in which the negative effects (such as collateral civilian casualties) clearly outweigh the military gain."¹⁴⁶

Virtually nothing important hinges on the above debate. Both the formulation of the rule of proportionality in Protocol I and whatever formulation is used for the customary international law rule, assuming for the sake of argument the two differ, are so flexible, and subjective that it is pointless to quibble about exact terminology.¹⁴⁷

¹⁴⁵ Dinstein, *supra* note 93, at 7 (citing Greenwood, *supra* note 11, at 77).

¹⁴⁶ U.S. DEP'T OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS, app. at O-10 (Apr. 1992) [hereinafter FINAL REPORT].

¹⁴⁷ Fenrick, *supra* note 15, at 125. The United States position as set out in the FINAL REPORT, *supra* note 146, which leaves the exact formulation of the customary international law rule on proportionality uncertain, is not without risks for the United States. See Parks, *supra* note 18, at 169 (taking a critical position in relation to

IV. Relationship of Military Objective to Collateral Damage / Proportionality

A. Introduction and Alternatives

For the purposes of this analysis, there are four broad likely alternatives as to the relationship between military objective and the collateral damage component of proportionality. Firstly, there may be no relationship between these two terms. Secondly, there may be an inverse relationship. In this relationship, as the field or scope of military objective widens that of proportionality narrows meaning that the amount of legally permissible collateral civilian damage becomes less. For example, perhaps an increase in the number or type of military objective is acceptable if the amount of collateral damage is reduced. Thirdly, there may be a complementary relationship. The same pressures or dynamics that are restricting the concept of military objective may be at work to lessen the amount of tolerable incidental civilian losses. An equally complementary relationship, albeit one that works in the opposite direction, is one in which the same pressures to expand the list of legitimate military objectives are at work to increase the quantum of legitimate incidental civilian damage. Lastly, there may be some other relationship entirely.

Despite the apparent inclusiveness of these four alternatives, the relationship of military objective and the incidental civilian losses component of proportionality may not be amenable to this form of analysis or in these terms. Regardless of this potential shortcoming, this examination may shed light on both concepts and their relationship.

Protocol I but admitting "There is value in codifying proportionality, if for no other reason than to define a

B. Inherent Relationship

There is an inherent relationship between military objective and proportionality as revealed by the common wording and the implications of that wording. Both concepts have in common the term “military advantage”. That term as used regarding military objective in Article 52 (2) is also logically linked to the related term “effective contribution to military action” in that same sub-article. Therefore, both military objective and proportionality require a consideration of military advantage. This commonality of military advantage has implications for who must assess the situation in light of that advantage, or at least what type of expertise is required to make those assessments. Those implications will be dealt with in Part VI.

Anyone applying either or both concepts, and as noted earlier all targeting decisions must involve a consideration of both concepts, must quickly move beyond the common element of military advantage and examine where these two concepts diverge. The adjective modifying “military advantage” in the concept of military objective is “definite”. The adjectives modifying “military advantage” in proportionality are “concrete and direct”. Concrete and direct is a higher requirement than merely definite.¹⁴⁸ This is logical given that the first usage is concerned only with military objectives but the second is concerned with military objectives, attacks upon which, entail a risk of incidental civilian losses i.e. in the context of collateral damage.

concept that has been badly abused in the past.”).

¹⁴⁸ BOTHE, *supra* note 37, at 365.

There is further divergence between the term “military advantage” as set out in these two concepts. That further point of divergence is temporal i.e. the point in time at which military advantage must be considered. The military advantage within the concept of military objective is that ruling in the circumstances at the time. This implies a requirement to assess military advantage in relatively immediate terms. However, the military advantage assessed in proportionality situations is that advantage “anticipated” i.e. something of a future military advantage. Likewise, the civilian losses in proportionality calculations are those “expected”, another future oriented term.

This may seem somewhat illogical from a military point of view. Any competent military commander, even a junior officer, is thinking beyond the near term. All commanders are trying to project their actions and the enemy’s reactions into the future. Indeed, this is one of the characteristics of successful commanders. They anticipate instead of simply reacting. In general, the more senior the commander the further into the future he or she should be trying to think. Thus, it might be thought that the immediacy of the military advantage required by the definition of military objective would pose a targeting problem for a realistic military commander. In fact, this immediacy requirement is not as stringent as it might at first appear. Article 52 (2)’s definition of military objective includes those objects that by their “purpose” make an effective contribution to military action. As mentioned earlier,¹⁴⁹ purpose means intended *future* use.

¹⁴⁹ See *supra* p. 14.

Thus, logical future possibilities can be integrated into the legal definition of military objective. Obviously, the other targeting strictures as to definiteness, circumstances ruling at the time etc. also still apply. These further requirements place a good faith, common sense limitation on future possibilities and prevent objects being targeted for fanciful or remote future possibilities.

The degree of subjectivity in both these concepts also implies something about their relationship. The definition of the concept of military objective contains many subjective elements.¹⁵⁰ The words “effective” and “definite” lack objective content thus requiring good faith application.

Yet, proportionality adds several layers of subjectivity on top of those in the definition of military objective. Proportionality assumes that a military objective has been identified so all those non-objective assessments have been made. Then proportionality requires additional subjective judgments from targeters. Such personnel must quantify (in a sense) the military advantage anticipated so they can balance the value of the military objective against the expected incidental civilian losses. Any such quasi-quantification is inherently very subjective. Expected civilian losses are also subjective judgments.¹⁵¹ The subjectivity of “excessive” is self-evident. Likewise, anticipated military advantage is a

¹⁵⁰ See *supra* p. 17.

¹⁵¹ Rowe, *supra* note 104, at 160 (highlighting the inherent subjectivity of proportionality especially as attacks are being planned. “At this stage of military operations those planning the attack are at their most optimistic and civilians most at risk.”).

somewhat elastic concept with variation possible from one reasonable commander to another.¹⁵²

What does all this additional subjectivity in the concept of proportionality imply for its relationship to military objective? This subjectivity in general and the differing levels of subjectivity in particular mean that any linkage between these concepts is going to be weak and sporadic. That is to say, when one concept is changed the effect on the other is going to be very difficult to discern given the intervening subjectivity i.e. the effect of all the unpredictable individualized variables.

Françoise Hampson has expressly dealt with the relationship of military objective and proportionality.¹⁵³ Her treatment of this issue centers on a perceived gap between the incidental civilian losses calculated on an individual target basis and the truer long term and aggregated effects on the civilian population. One of her proposals is to take into account a proportionality factor in the definition of military objective.¹⁵⁴ This is a needless complication. Further, there are very good reasons to keep considerations of the concept of military objective and of the concept of proportionality separate, as will be set out later.

The gap Françoise Hampson is concerned with disappears if a proper wider view of targeting is taken regarding both the definitions of military objective and incidental civilian

¹⁵² Despite this subjectivity, the conventional definition of proportionality at least provides some guidance, albeit subjective, and is better than no guidance on such a crucial concept. See ICRC COMMENTARY, *supra* note 16, paras. 2210, 2219.

¹⁵³ Hampson, *supra* note 51, at 50-51.

¹⁵⁴ The other is the evaluation of targets in the context of explicit war aims. See *infra* Part V.L.

losses. As the earlier analysis of targeting sets of related objects with the bridge example made clear,¹⁵⁵ both terms should be considered over entire target sets. This is the military and targeting reality. Many targets are in actuality enemy capabilities provided by sets of objects. However, this targeting by set also demands the military planners factor in the incidental civilian losses from all such related attacks.¹⁵⁶

V. Dynamics of Military Objective and Collateral Damage / Proportionality

A. Introduction

To help discern the dynamics that might be at play in the terms military objective and collateral damage this thesis will examine a fairly extensive range of controversies, proposals and developments pertaining to targeting. After outlining each issue and in some cases offering an opinion on it, the paper will then specifically look for what that issue might tell us about the “pressure points” in the law of war. It is this paper’s theory that the fact of controversies, initiatives or developments points to where the current legal regime may be inadequate, under stress or how it has or might change i.e. its dynamics. The main interest is not necessarily in deciding which point of view in any controversy is legally correct or if the reform proposal is worthwhile. Rather the objective is to determine what the controversies or initiatives themselves tell us about the law of armed conflict as it pertains to the definition of military objective and incidental civilian losses within the rule of proportionality. Of course,

¹⁵⁵ See *supra* pp. 37-38.

¹⁵⁶ Remoteness is an analytically separate issue that will be dealt with later. See *infra* pp. 61-63.

the legal and non-legal strength of each side of a controversy or the legal and other merits of a given initiative will affect any assessment of how likely the controversy or initiative is to result in changes to the law of war. Given the limited use made of these topics, as set out above, this thesis will only briefly outline these issues. This somewhat abbreviated approach will allow a broader range of issues to be examined. The extensiveness of the range examined should allow firmer conclusions to be drawn about the dynamics and relationship at work.

B. General Public Concern for Collateral Damage

There is one dynamic relating to proportionality that is particularly significant. That dynamic is the dramatically decreased public tolerance for collateral damage. This phenomenon is of such strength it may outweigh all the others this paper considers. In historical terms, the three conflicts this thesis uses have caused remarkably few direct civilian losses.¹⁵⁷ The concern for indirect or longer-term civilian losses as a war-fighting issue is a relatively new phenomenon. The effects of war on enemy civilian populations after the Second World War was certainly a relief or foreign assistance issue but was not generally seen as any particular indictment of the way the war had been fought.

The phenomenon of a greatly increased sensitivity to collateral damage may say two alternative things about the relationship between military objective and incidental civilian

¹⁵⁷ See e.g., Fenrick, *supra* note 7 (using the figures from Parks, *supra* note 18, at 154 with Operation Allied Force figures added). The comparable figures for the 2001 bombing of Afghanistan may not yet be reliable but preliminary indications are they are not dramatically different in relative scale from the 1990 Gulf conflict or the 1999 Kosovo bombing. See Campbell, *supra* note 2.

losses. Concern about collateral damage may be so heightened that it restricts the numbers and types of objects considered lawful targets. This would imply that there is a complementary relationship i.e. the same pressures at work to decrease the amount of lawful incidental civilian damage are also at work to reduce the number and type of military objectives. Alternatively, the concern about collateral damage may be so focused on purely civilian effects that if civilian losses are eliminated or kept very low, the number and type of lawful military objectives will be a matter of indifference. This would lead to an expansion of the concept of military objective. This implies an inverse relationship between these two terms.

C. Difference in Customary and Conventional Definitions of Military Objective

Regardless of the merits of the argument that the customary international law definition of military objective is broader than the conventional definition, what does the fact that this argument is being made say about the dynamics of the concept of military objective? To the extent an expanded definition has merit, it argues for an obvious and significant enlargement of the number of objects considered lawful military objective.

However, the fact that the proposed customary international law definition of military objective would have a tendency to expand the category of lawful military objective as compared to the conventional definition says nothing necessarily about the relationship of military objective to incidental civilian losses.

D. Difference in Customary and Conventional Rules of Proportionality

The implications of the analogous debate regarding proportionality are even less clear-cut. Given the conclusion that the customary and conventional formulations of the rule are to all practical effect indistinguishable, no conclusion as to the dynamics of the rule of proportionality can be drawn from this debate. To the extent that Hays Parks' arguments about the real complexity of the collateral damage question and the shared responsibility of the attacker and defender for such losses is a part of this issue,¹⁵⁸ they imply a somewhat increased tolerance for what would otherwise be viewed as incidental civilian losses. However, this phenomenon does not seem to have any implications for the concept of military objective.

E. Civilian Morale

The legitimacy of attacking the enemy's civilian morale as such has arisen in recent conflicts, most sharply in the context of the NATO bombing of Kosovo.¹⁵⁹ To a lesser extent, it also arose in the Coalition attack on Iraq in 1991. This section of the paper will only be considering the legality of an attack on an abstract concept i.e. civilian morale. The concrete way in which this is done may be by attacking media outlets; the objects proposed by Colonel Dunlap;¹⁶⁰ perhaps electrical systems or other physical objects. Thus, this analysis will necessarily blend somewhat with the later consideration of certain of those other concrete objectives.

¹⁵⁸ Parks, *supra* note 18, at 149-68.

¹⁵⁹ The targets most closely associated with civilian morale were the media outlets and the electrical systems.

¹⁶⁰ See *infra* Part V.K.

The controversy arises over whether civilian morale *per se* is a military objective within the meaning of Article 52 (2) of Protocol I. Does destruction of or diminution of an opponent's civilian morale offer a definite military advantage? It would be too rigid and technical to argue that civilian morale does not qualify as a physical object. Civilian morale certainly does make an effective contribution to military action.¹⁶¹ Are strategic and psychological goals illegitimate targets?¹⁶² The same questions arise whether one is using the Protocol I definition of military objective or the definition proposed by those who maintain the customary international law definition of military objective is broader than in Protocol I.

There is an historical context for attacks on civilian morale and that history is relevant to this debate. The background of such attack is perhaps most dramatically illustrated by the Second World War attacks on enemy morale by strategic aerial bombardment.¹⁶³ The efficacy of such attacks is far from clear. There is at least some evidence that those attacks were counter-productive either not affecting morale in any significant way or perhaps even strengthening the will to resist.¹⁶⁴ What is not in doubt is the tens and hundreds of thousands

¹⁶¹ USAF BASIC DOCTRINE, *supra* note 13, at 6 (stating "While physical factors are crucial in war, the national will and the leadership's will are also critical components of war. The will to prosecute or the will to resist can be decisive elements."). See also Bernard Brodie, *Tet Offensive*, in DECISIVE BATTLES OF THE TWENTIETH CENTURY 321, 334 (Noble Frankland & Christopher Dowling eds., 1976) (concluding that in his 1968 offensive North Vietnamese General Giap "expected his offensive to have a great shock effect on the South Vietnamese and especially the Americans, and it most certainly did." Such was the shock that "it was probably unique in that the side that lost completely in the tactical sense came away with an overwhelming psychological and hence political victory. And there can be no question of its decisiveness.").

¹⁶² Parks, *supra* note 18, at 141 (arguing they are not).

¹⁶³ Parks, *supra* note 27, at 77-87.

¹⁶⁴ Fleck, *supra* note 54, at 50 n.22.

of civilian casualties resulting from such bombing.¹⁶⁵ It seems likely that bloody history was at least part of the reason for the current prohibition on deliberate terrorization of the civilian population found in Protocol I Article 51 (2).¹⁶⁶

Recent justification for attacks on civilian morale, in the sense of the enemy civilian population's support for the war effort, is rooted in sophisticated modern strategic bombing theory. Proponents hold that it is obvious that wars are not fought for their own sakes. Colonel John Warden, an influential strategic theoretician of air warfare states "We don't go to war merely to have a nice fight; rather, we go to war to attain something of political value to our organization."¹⁶⁷ To obtain those objectives it is most efficient to attack the enemy's centers of gravity. Speaking of the future, Michael Schmitt says, "The goal will still be to strike decisively at an enemy's center of gravity"¹⁶⁸

Often those centers of gravity will include the enemy civilian support for its government's war effort. Such support may be the enemy's critical weakness. Eroding that support might be the quickest and most efficient way to prevail over an enemy. Whatever its

¹⁶⁵ It is difficult, if not impossible, to calculate the civilian casualties in the Second World War caused by attacks specifically directed against civilian morale vice more traditional military objectives. What is clear is that at least for the Royal Air Force civilian morale was a significant bombing objective either primarily or secondarily. See generally W. A. Jacobs, *The British Strategic Air Offensive Against Germany in World War II*, in CASE STUDIES IN STRATEGIC BOMBARDMENT 91, 92, 121 (1998) (summarizing the February 1942 Air Ministry directive to Bomber Command to "destroy large urban areas with the aim of undermining the morale of the German industrial work force." Just one such attack, that in July 1943 against Hamburg killed 50,000 and left nearly 1,000,000 homeless.).

¹⁶⁶ Protocol I, *supra* note 10, art. 51 (2) states "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."

¹⁶⁷ John A. Warden, III, *The Enemy as a System*, 1 AIRPOWER J. 40, 43 (Spring 1995).

¹⁶⁸ Schmitt, *supra* note 9, at 1055.

legal implications, such a sentiment is rooted in United States air force history. Brigadier General "Billy" Mitchell said in 1930, "It is now realized that the hostile main army in the field is a false objective, and the real objectives are the vital centers."¹⁶⁹

This possibility has led the United States Air Force to conclude that proper air warfare strategy should "place(s) maximum stress on both enemy defenses and the enemy society as a whole."¹⁷⁰ Further, "Strategic attack objectives often include producing effects to demoralize the enemy's leadership, military forces, and population, thus affecting an adversary's capability to continue the conflict."¹⁷¹ Confirming the centrality of such a psychological approach is one assessment of the 1999 NATO bombing campaign as "an exercise in coercive diplomacy designed to change one man's mind"¹⁷²

Despite the historic ambiguity of the effectiveness of attacking enemy civilian morale, there is some indication it can be effective at least in some circumstances. The North Vietnamese re-commenced negotiations after 1971 United States bombing intended to have exactly that effect.¹⁷³ Serbia's leader, Milosovic, did eventually agree to NATO's demands after a bombing campaign that targeted certain objects intended to affect civilian morale.¹⁷⁴

¹⁶⁹ USAF BASIC DOCTRINE, *supra* note 13, at 45.

¹⁷⁰ *Id.* at 24.

¹⁷¹ *Id.* at 51.

¹⁷² IGNATIEFF, *supra* note 7, at 110.

¹⁷³ Parks, *supra* note 18, at 142-43. The bombing campaign presumably hit military objectives but the motivation in hitting those military objectives was not the defeat of military forces but a change in enemy government policy. This is a legitimate use of military force. War always has a political motivation. Motivation and the objective characteristics of the targets must not be confused.

¹⁷⁴ Meyer, *supra* note 70.

Not targeting such civilian morale related targets may have the effect of prolonging a war and resulting in many more military and collateral civilian casualties.

However, one of the problems with such strategies is that they require attacks that will often at least appear to be deliberately terrorizing contrary to Protocol I Article 51 (2).¹⁷⁵ More generally, the strategy ignores the entire structure of the law of war. On its face, it justifies any means to obtain political-military ends, blithely ignoring the fundamental dictum “In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.”¹⁷⁶ Civilian morale targeting usually acknowledges none of the historically justified and hard won limitations law has placed on states’ discretion in waging war. It often negates the very basis of the law of armed conflict justifying the targeting of any civilian objective if it represents a center of gravity. Destroying a treasured national religious icon or targeting an enemy leader’s grandchildren would be justified by such a strategy if such targets met the center of gravity criteria.

Despite the preceding, occasional direct attacks on civilian morale may have decisive effects. However, such attacks are not and should not be legitimate. The history of the effectiveness of such attacks is at best mixed.¹⁷⁷ In those cases where it has not worked, as in the Second World War, it has had a tremendous civilian cost. In terms of basic analysis, the

¹⁷⁵ Protocol I, *supra* note 10, art. 51 (2) states in part, “Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”

¹⁷⁶ Protocol I, *supra* note 10, art. 35. This stricture is not new. See *e.g.*, art. 22 of Regulations to the 1899 Convention (II) with respect to the Laws and Customs of War on Land and the 1907 Convention (IV) respecting the Laws and Customs of War on Land, *both reprinted in* THE LAWS OF ARMED CONFLICTS 263 (Dietrich Schindler & Jiri Toman eds., 3rd ed. 1988).

¹⁷⁷ Parks, *supra* note 27, at 82.

military justification is at best uncertain and the cost in humanitarian terms too potentially devastating. Such attacks cross the bright-line fundamental rule of distinction. Attacking civilian morale has proved to be the bloodiest of gambles.

This was also the conclusion of the ICTY Committee. It found “[C]ivilian objects and civilian morale as such are not legitimate military objectives.”¹⁷⁸ Hays Parks agrees “[A]ttacks directed exclusively at civilian morale ...is a practice rightly put to an end by Additional Protocol I.”¹⁷⁹ The British military concurs “[T]he morale of an enemy’s civilian population is not a legitimate target.”¹⁸⁰

This conclusion is subject to one very significant caveat. There is no prohibition of attacks on otherwise legitimate military objectives that also have an effect on civilian morale. Indeed, such effects may be the main motivation for the attacks. Hays Parks states “[M]orale of an enemy nation inevitably may be affected as a by-product of lawful attacks on military objectives.”¹⁸¹ William Fenrick is of a like mind. “It would appear, however, that it is lawful to attempt to undermine enemy civilian support for the war effort by other means, including attacks on military objectives.”¹⁸² The most basic of examples illustrates the necessity for this conclusion. A combatant cannot be expected to refrain from killing enemy soldiers because those combatant deaths will demoralize the civilian population. Such

¹⁷⁸ ICTY COMMITTEE REPORT, *supra* note 2, para. 55.

¹⁷⁹ Parks, *supra* note 27, at 84. Fenrick cites this authority to support his opinion “Neither the civilian population nor civilian morale constitute legitimate military objectives.” Fenrick, *supra* note 7.

¹⁸⁰ BRITISH DEFENCE DOCTRINE, *supra* note 120. *See also* Bothe, *supra* note 99 para. 5.

¹⁸¹ Parks, *supra* note 27, at 84.

¹⁸² Fenrick, *supra* note 7.

demoralization can even be the legitimate motivation for military actions.¹⁸³ To hold to the contrary is to confuse motivation and the objective characteristics of the potential target. Requiring this link to military objective (and it may be no more than a link as long as it is a good faith reasonable link meeting the threshold military objective requirement) permits targeting of military objectives with a high-civilian-morale impact. Such targeting must, like any targeting, also satisfy the rule on proportionality. This linkage prevents a descent down the slippery slope but accords military factors their proper weight. It is a solution classically balancing military necessity and humanity.

Conventional attacks on civilian morale require the striking of actual physical targets.¹⁸⁴ Such attacks may include strikes against physical objects examples of which are media outlets and in a less clear-cut sense, electrical generating/distribution facilities. Because civilian morale can only be struck by attacks on such targets, this paper will examine media strikes and certain aspects of attacks against electricity related facilities as representative morale targets to discern what if anything these controversies reveal about the relationship of military objective and the incidental civilian losses component of proportionality. Attacks on the abstract of civilian morale will not be separately considered regarding the relationship between these two terms.

F. Electrical Systems

¹⁸³ Certain undoubtedly legal attacks against military objectives may be motivated much more by psychological or morale considerations than by any real military benefit. *See e.g.*, Parks, *supra* note 18, at 141 & n.421 (describing the mainly psychological effects of the "Doolittle" bombing raid upon Japan by the U.S. in 1942 a few months after the Pearl Harbor air attack by Japanese forces).

¹⁸⁴ Cyber warfare is beyond the scope of this thesis and will not be considered.

Significant targeting controversies have arisen concerning the legality of targeting an enemy's national electrical generating and distribution system. In the Gulf War, the Coalition allegedly "virtually destroyed Iraq's electrical system."¹⁸⁵ Likewise, NATO targeted Serbia's electrical capacity in its 1999 bombing campaign.¹⁸⁶ The collateral civilian effects of these attacks generated much controversy.¹⁸⁷

However, in both the cases of Iraq in 1991 and Serbia in 1999, the respective electrical systems met the threshold test of military objective. In Iraq's case, "Power supplies provided significant military support."¹⁸⁸ The ICTY Committee accepted that NATO's attacks against at least two of Serbia's electrical facilities had a very direct link to Serbia's air defenses.¹⁸⁹ United States authorities justified such NATO attacks with the statement "Air attacks on selected infrastructure targets, such as bridges and electric power systems, degraded the ability of the FRY military to perform command and control and to resupply and reconstitute its forces."¹⁹⁰

¹⁸⁵ NEEDLESS DEATHS, *supra* note 2, at 9; ROGERS, *supra* note 82, at 45 (stating that Coalition attacks eventually made 88% of Iraq's pre-war electrical power unavailable. Rogers disagrees with other higher figures.).

¹⁸⁶ Meyer, *supra* note 70.

¹⁸⁷ Egorov, *supra* note 16, at 185; Arkin, *supra* note 2. It is interesting to note neither Amnesty International, *supra* note 5, nor Human Rights Watch, *supra* note 5, in their respective reports mentioned the electrical systems as *per se* illegal targets.

¹⁸⁸ Hampson, *supra* note 51, at 50.

¹⁸⁹ ICTY COMMITTEE REPORT, *supra* note 2, para. 74.

¹⁹⁰ Press Release, *supra* note 104.

Military target listings of electrical system objectives may be deceptive. Such lists might be much less restrictive than they appear. While most such listings expressly link the targeted electrical power objectives to the military¹⁹¹ virtually all modern electrical systems are integrated national even continental grids. There are few if any significant dedicated military electrical systems. Thus, to deprive the military of power the entire electrical system must be attacked.¹⁹² Because of its integrated grid nature, the whole enemy electrical system will usually be a legitimate military objective.

The basic justification is that "In most cases denying that power to the enemy's armed forces will offer a definite military advantage."¹⁹³ William Fenrick and Professor Dinstein seem to be of the same view.¹⁹⁴ The former cites the work of Daniel Kuehl on the strategic value of enemy electrical systems.¹⁹⁵

Of course, destroying or even interrupting a nation's electrical system is going to be immediately and dramatically apparent in any moderately developed country. There are

¹⁹¹ 1956 ICRC Draft Rules, *supra* note 30 (listing as valid military objectives "installations providing energy mainly for national defence"); U.S. DEP'T. OF DEFENSE, CONDUCT OF THE PERSIAN GULF CONFLICT: AN INTERIM REPORT TO CONGRESS 4-2 (July 1991) [hereinafter PERSIAN GULF CONFLICT INTERIM REPORT] (listing U.S. target sets for the air campaign as including "electrical production facilities powering military systems").

¹⁹² ROGERS, *supra* note 82, at 45.

¹⁹³ Greenwood, *supra* note 11, at 74.

¹⁹⁴ Fenrick, *supra* note 7; Dinstein, *supra* note 26, at 21.

¹⁹⁵ Fenrick, *supra* note 7, (citing D. T. Kuehl, *Airpower vs. Electricity: Electrical Power as a Target for Strategic Air Operations*, 18 J. OF STRATEGIC STUD. 237 (1995)).

obvious effects on civilian morale. In 1999, NATO alluded to the morale effects of such strikes. It was part of NATO's motivation for targeting the electrical system.¹⁹⁶

They were also very effective in this regard. Michael Ignatieff writes of the attacks on Serbia's electrical transformer yards, "Hitting these yards turned out to be the single most effective military strike of the campaign. ... After the grid was destroyed, both the political elite and the people knew that NATO had secured control of the regime's central nervous system."¹⁹⁷ However, as argued in consideration of targeting civilian morale in the abstract, such targeting is only legitimate if linked to a threshold military objective. Those criteria being met, the effect on civilian morale may legitimately either be a bonus from or even the main motivation for such strikes.

However, having decided that electrical systems will generally be legitimate military objectives does not end even a basic targeting analysis. Proportionality must also be addressed. Immediate proportionality concerns in targeting electrical facilities would involve any incidental civilian casualties in the attacks themselves. More significantly for these types of target sets are likely to be the secondary or reverberating effects.

¹⁹⁶ Lieutenant General M. Short Interview, *Morning Edition*, (National Public Radio broadcast, Sept. 15, 1999) (during which Lieutenant General Short, one of NATO's air commanders during its 1999 bombing of Serbia said "There can be no doubt in your mind that with the power down ... and the refrigerator not running and no water in your house and the public transportation system in Belgrade not running and no street lights, that the war was brought home, not just to the ruling elite, but to the average Serb on the street.").

¹⁹⁷ IGNATIEFF, *supra* note 7, at 107-08.

For some “the cost to the civilian population of these attacks on the electrical system was severe” in Iraq in 1991.¹⁹⁸ Others went further. “Evidence suggests that the Coalition’s overall campaign against Iraq’s electrical system provided negligible military gains relative to the amount of civilian suffering it caused.”¹⁹⁹ These effects were felt through the interruption or complete stoppage of electrical power to water plants, sewage facilities, hospitals, refrigeration equipment and irrigation capability. Such effects in the *immediate* aftermath of an attack are a necessary collateral damage consideration for any commander contemplating such military action.

Yet, it is with the later secondary or reverberating effects of such attacks that a more contentious debate begins. How far into the future must the attacking military commander project collateral civilian damage from his or her strikes? This issue of remoteness, particularly, but not exclusively, in the context of attacks on electrical grids, is obvious, real and recognized.²⁰⁰ Further, the potential for such longer term secondary incidental civilian effects are likely to grow, given modern societies’ increasingly inter and intra-connectivity.

Any determination of how far into the future commanders must project collateral damage has to acknowledge some very real world limitations. How is a commander supposed to know what resources the enemy has to repair damage? How should the attacking commander guess how the enemy will prioritize his resources? Perhaps he should get hospitals’ power restored but he may choose to channel the power to his air defence

¹⁹⁸ NEEDLESS DEATHS, *supra* note 2, at 9.

¹⁹⁹ Normand & Jochnick, *supra* note 16, at 7.

²⁰⁰ Greenwood, *supra* note 11, at 79; Hampson, *supra* note 51, at 51.

facilities. Exactly how the war will turn out even if victory is assured (and often it is not) is not infrequently an open question. How much freedom will either party have to affect events during and after the conflict? Will the post-conflict government receive assistance? How will the defending government allocate scarce resources? There are simply too many variables over which the military commander can have no influence. "It would be wholly unreasonable to expect a commander to take into account actions over which he had no control."²⁰¹ These practical limitations mean an attacking commander legally need only project incidental civilian damage into the immediate but not indefinite future. Although very fact dependent, a generally reasonable standard would be days and weeks but not months and years.

The criticism of the Coalition for the post-war effects of its attacks on the Iraqi electrical system seems particularly overblown.²⁰² The real problem appears to be either the effect of on-going sanctions, the responsibility for which arguably does not rest outside Iraq or the Iraqi government's priorities and competence. As A.P.V. Rogers points out, while Iraqi power was reduced to 12% of its pre-war level by the end of the war, within three

²⁰¹ Hampson, *supra* note 16, at 93; *contra* Fenrick, *supra* note 7, (quoting with approval from J. W. Crawford, *The Law of Noncombatant Immunity and the Targeting of National Electrical Power Systems*, 21 FLETCHER F. OF WORLD AFF. 101, 101-02 (1997). Crawford argues that objections to consideration of relatively remote effects on the basis they are "theoretical scholastic postulation" are "insincere". However, Crawford ignores the real world limits of knowledge and predictive accuracy. At a certain point such predictive activities become so unreliable and speculative as to be meaningless. There is something of a contradiction in the requirement for military advantage to be considered in the relatively immediate "in the circumstances ruling at the time" but for incidental civilian losses to be projected into the relatively indefinite future.

²⁰² NEEDLESS DEATHS, *supra* note 2, at 9-11; Arkin, *supra* note 2.

months it was at 23% of pre-war levels and was at 90% within 18 months.²⁰³ Even a 12% figure should have permitted most emergency power to water, sewage and hospital facilities.

In conclusion, in the vast majority of cases such attacks on an enemy nation's electrical generating and distributions system are legitimate. The nature of national power grids means the entire system becomes a valid military objective. If the threshold military objective test is met and the incidental civilian losses are not disproportionate, such attacks are legitimate even if the main motivation for such strikes is to affect civilian morale.²⁰⁴ Proportionality must be considered but only over the relatively short term perhaps days and weeks. More remote effects will generally be beyond the attacking commander's ability to control or even reliably predict. Thus, they are not his legal responsibility.

The fact of the controversy over the targeting of enemy civilian electrical systems demonstrates a decreased tolerance of collateral damage. To the extent this controversy will have an effect, it would expand the concept of incidental civilian losses in a temporal sense i.e. make the attacker consider the longer-term effects of such targeting than heretofore. It would also require attackers to assess much more indirect and remote collateral damage than has traditionally been the case. The effect would also be to render civilian electrical systems unlawful military objectives much more often than has recent historical practice i.e. decrease

²⁰³ ROGERS, *supra* note 82, at 45-46.

²⁰⁴ Of course, it is human tendency to allow one's motivations to color one's objective judgment. The danger here is that in deciding if an attack on a legitimate military objective (but having a high-civilian-morale impact) is proportionate, one might be tempted to exaggerate the anticipated military advantage so as to permit the attack despite incidental civilian losses that would not be justified based on the strictly military advantage involved. Like many other difficult law of war decisions the only real guide and protection is the good faith and moral character of the decision-maker.

the scope of lawful military objective. Since the tendency of this issue is to reduce both acceptable levels of collateral damage and range of military objective, it evidences a complementary relationship.

G. Media Outlets

Attacks on media outlets, more particularly a specific 1999 NATO strike on the Serb Radio and Television (RTS) facilities in Belgrade caused a great deal of controversy.²⁰⁵ While some mention was made of targeting telecommunications infrastructure during the Gulf War,²⁰⁶ the prominence of this one incident in criticism of NATO's 1999 bombing campaign was extraordinary. The ICTY Committee devotes more space to its analysis of this attack than any other strike. It was the first incident referred to by Amnesty International in its Collateral Damage Report.²⁰⁷ It used a picture of the RTS attack's aftermath on the cover of its report.²⁰⁸ It was the only specific target mentioned in Amnesty International's response to the report of the ICTY Committee.²⁰⁹ Likewise, Human Rights Watch listed the RTS

²⁰⁵ See e.g., Egorov, *supra* note 16, at 185.

²⁰⁶ Greenwood, *supra* note 11, at 73.

²⁰⁷ COLLATERAL DAMAGE, *supra* note 5, in summary, 2 of introduction, 25.

²⁰⁸ *Id.* cover.

²⁰⁹ Public Statement, Amnesty International, Amnesty International's Initial Comments on the Review by the International Criminal Tribunal for the Former Yugoslavia of NATO's Operation Allied Force (June 13, 2000) (on file with author).

attack first in its complaint about NATO's allegedly illegitimate targeting of non-military targets.²¹⁰

The objections to this strike were two-fold. Critics maintain the RTS facility was not a military objective and that in any event the collateral damage, being 16 civilian RTS workers killed, was disproportionate.²¹¹

The dilemma with such apparently civilian facilities is that television-broadcasting facilities always have a potential military use.²¹² With virtually a flick of a switch, broadcasting stations can be used as an alternate telecommunications facility for the military. Referring to Coalition attacks upon telecommunications facilities in general during the Gulf War, Christopher Greenwood said "Although armed forces seldom rely primarily upon the ordinary telecommunications system, the importance of that system as a supplement, or alternative, to dedicated military communications networks means that the coalition's practice is likely to be the model in future conflicts."²¹³

The vital military utility of such facilities has long been recognized. The 1956 ICRC Draft Rules list of lawful military objectives includes "The installations of broadcasting and television stations; telephone and telegraph exchanges of fundamental military

²¹⁰ CIVILIAN DEATHS, *supra* note 5, at summary 1.

²¹¹ COLLATERAL DAMAGE, *supra* note 5, at 43, 45; CIVILIAN DEATHS, *supra* note 5, at summary 7; Tania Voon, *Pointing the Finger: Civilian Casualties of NATO Bombing in the Kosovo Conflict*, 16 AM. U. INT'L L. REV. 1083, 1107; Bring, *supra* note 16, at 3.

²¹² There is a very crucial distinction between broadcasting capability and other capabilities e.g. studios that merely produce television programs.

²¹³ Greenwood, *supra* note 11, at 73.

importance.”²¹⁴ Although one does not wish to place undue emphasis on a single semicolon, the drafters’ intent is clearly to link the requirement of “fundamental military importance” only to telephone and telegraph exchanges. Broadcasting and television stations need no such qualifier to be military objectives *per se*. Contrary to what Amnesty International claims, the French text of that same rule makes exactly the same distinction.²¹⁵

Reinforcing this interpretation is the 1954 Hague Convention on Cultural Property. It has a provision requiring the separation of protected cultural property from legitimate targets. Such legitimate targets are “any important military objective constituting a vulnerable point, such as, for example, an aerodrome, *broadcasting station*, establishment engaged upon work of national defence, a port or railway station of relative importance or a main line of communication.”²¹⁶ Two interpretative points supporting the classification of television broadcast facilities as military objectives in themselves arise from this provision. First is the prominence given broadcast stations i.e. it is the second example given right after aerodromes. Secondly, as with the 1956 ICRC Draft Rules, broadcasting stations, unlike facilities listed after, are not linked to any specific finding of defence or importance in order to be military objectives.

²¹⁴ 1956 ICRC Rules, *supra* note 30.

²¹⁵ COLLATERAL DAMAGE, *supra* note 5, at 44-45. The French version quoted by Amnesty International reads, “Les installations des stations de radiodiffusion et de télévision, les centres téléphoniques et télégraphiques d’intérêt essentiellement militaire.” The comma after “télévision” tends to divorce the requirement of “d’intérêt essentiellement militaire” from “Les installations des stations de radiodiffusion et de télévision” exactly as does the semicolon in the English version.

²¹⁶ Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, May 14, 1954, art. 8 (1) (emphasis added), *reprinted in* THE LAWS OF ARMED CONFLICTS 745-75 (Dietrich Schindler & Jiri Toman eds., 3rd ed. 1988) [hereinafter 1954 Hague Convention on Cultural Property]; *see also* Dinstein, *supra* note 26, at 23 (making a similar argument).

United States Air Force doctrine recognizes this same reality:

Normally, one of the key target systems is the enemy's command and control (C2) system. Regardless of the nature of the adversary, disrupting the ability to communicate can be a critical step toward achieving strategic paralysis and disunity by cutting off the enemy's political/military leadership from the civilian populace ... and fielded force.²¹⁷

It was upon such a command and control capability basis (married with a finding that "the civilian casualties were unfortunately high but do not appear to be clearly disproportionate") that the ICTY Committee found insufficient evidence to warrant an investigation into NATO's attack on the RTS facility.²¹⁸

Much of the criticism of NATO's attack in this regard probably arose from the alternative and on occasion apparently contradictory rationales given for the attack by NATO. NATO at various times justified the raid upon the propagandistic nature of RTS' programming.²¹⁹ Because propaganda is such a subjective term and, like attacks upon civilian morale, has such a potential to degenerate into targeting of civilians and civilian objects, this is not a sufficient justification for an attack. There is no definite military

²¹⁷ USAF BASIC DOCTRINE, *supra* note 13, at 52-53. Cutting off enemy leadership from its "fielded force" is undoubtedly legitimate.

²¹⁸ ICTY COMMITTEE REPORT, *supra* note 2, paras. 77, 79.

²¹⁹ Press Release, *supra* note 104 (stating that NATO "alliance leaders decided to further intensify the air campaign by expanding the target set to include military-industrial infrastructure, *media*, and other strategic targets") (emphasis added); General W. Clark, Supreme Allied Commander of NATO in 1999, said "There were other types of targets that had a high political symbolism, which went beyond their actual military value – like the television system. We knew that Milosevic used TV as an instrument of command and control. He used it to control the population, to inflame the passions of ethnic cleansing, and so forth" from *Frontline Interview* by the U.S. Public Broadcasting System (PBS) (Feb. 2, 2000) available at <http://www.pbs.org/wgbh/pages/frontline/shows/kosovo/interviews/clark.html>. (last visited 3 Apr. 2002); COLLATERAL DAMAGE, *supra* note 5, at 42-46.

advantage and even less a concrete and direct military advantage in striking propaganda related targets.

The ICTY Committee seems to have been of the same opinion.²²⁰ William Fenrick, a Senior Legal Adviser with the ICTY, states "With reference to the RTS attack, the OTP (Office of the Prosecutor) ICTY was of the view that attacking RTS simply because it disseminated propaganda was probably unlawful but that it appeared RTS might also fulfill another function."²²¹ The other function referred to was the potential military command and control role plus perhaps a regime directing function in an autocratic state. Both the ICTY Committee and William Fenrick leave open the door for an exception to the prohibition on targeting propaganda-generating facilities if such facilities are used to incite egregious international crimes.²²²

The above reference to an additional function of a propaganda organ again raises the issue of linkage. As with attacks on civilian morale in the abstract, attacks on media stations may be legally justified as long as they meet the threshold test for a conventional military objective. This justifies an attack even if a subsidiary or perhaps major reason for the attack is to attack civilian morale or shut down the enemy's propaganda apparatus. The requisite linkage to military objective provides a brake on the deleterious effects of attacking truly

²²⁰ ICTY COMMITTEE REPORT, *supra* note 2, para. 76 (stating "It appears, however, that NATO's targeting of the RTS building for propaganda purposes was an incidental (albeit complementary) aim of its primary goal of disabling the Serbian military command and control system and to destroy the nerve system and apparatus that keeps Milosevic in power.").

²²¹ Fenrick, *supra* note 7.

²²² ICTY COMMITTEE REPORT, *supra* note 2, para. 47; Fenrick, *supra* note 7. Although this is not an unreasonable conclusion, no specific explanation, rationale or analysis is given in this regard.

civilian targets in the name of destroying the enemy's propaganda apparatus. This need for a linkage can be illustrated by one of Human Rights Watch's legally valid complaints.²²³

While a television station's ready military potential justifies an attack on its broadcasting capability i.e. its transmitters, switches, cables and such, it does not justify an attack upon the studios of such a facility to the extent the two capabilities are separate.

Analysis of this particular military objective also illustrates another targeting phenomenon. That is the systems nature of many military objectives. Critics of Coalition and NATO bombing often fail to appreciate the systemic nature of target sets. It does not matter that RTS was broadcasting within hours of the NATO attack.²²⁴ That quick recovery does not necessarily negate the concrete and direct military advantage anticipated from destroying the target. Some targets, as with a single broadcasting facility in a larger system, are merely parts of a network. Destruction of one node is only part of the process. Significant military advantage is only achieved when all or at least a certain number of such nodes are destroyed. This may require repeated and widespread attacks. As mentioned earlier,²²⁵ this was the point of a number of reservations to Protocol I Article 52(2). Reserving countries wished to ensure that no unrealistically narrow interpretation of attack would be used. It is important to again note that this target system aggregation is necessary on both basic targeting questions. Proportionality, like the military advantage must be measured over the entire target system. It is not sufficient to only weigh the expected civilian casualties from just one of the attacks.

²²³ CIVILIAN DEATHS, *supra* note 5, at 15.

Although unrelated to this thesis, this attack brought up an interesting interoperability situation. There might be some concerns about the effect of NATO being composed of nations, only some of whom have ratified Protocol I. According to Human Rights Watch the legality of the attack on the RTS facility was the subject of “considerable disagreement between the United States and French governments.”²²⁶ At that point, neither the United States nor France was party to Protocol I.²²⁷ Michael Ignatieff has the United States and the United Kingdom “at loggerheads” over the same topic.²²⁸ Those two countries are on opposite sides of the Protocol I divide. Thus, at least in this situation, Protocol I does not seem to explain inter-allied targeting discord.

In summary, attacks upon the media are only justified if the facility in question meets the conventional definition of military objective. Television broadcasting stations, given their instant utility to the military, will virtually always be such objectives. Attacks cannot be justified based solely on the facilities transmission of enemy propaganda. However, if a propaganda organ simultaneously meets the separate definition of military objective then it might be attacked. There may be a separate category of lawful target for broadcasters of incitement to genocide-like crimes.

²²⁴ *Id.* at 42.

²²⁵ *See supra* p. 37.

²²⁶ CIVILIAN DEATHS, *supra* note 5, at 7.

²²⁷ France acceded to Protocol I only on Apr. 11, 2001 i.e. about two years after the NATO bombing campaign in Serbia. ICRC Web-site, *supra* note 60.

²²⁸ IGNATIEFF, *supra* note 7, at 194.

In this regard, it is interesting to note that Canadian aircraft were assigned to attack the television station in Novi Sad during NATO's bombing of Serbia. That attack apparently caused no incidental civilian casualties and attracted no criticism.²²⁹ This is a very slight indication of an inverse relationship between military objective and collateral damage i.e. the target set was arguably expanded without apparent concern presumably because incidental civilian losses were avoided.

The critics of strikes against media outlets and the proponents of such attacks in a civilian morale attacking sense, share a similar view of the relationship between military objective and proportionality. Both groups believe, or at least their positions imply, that the relationship between these concepts is complementary. Critics are pushing for a restricted view of military objective and at the same time, a restricted view of what is lawful collateral damage.²³⁰ Proponents of such strikes who believe that civilian morale is a lawful target are proposing an expansive view of military objective and an expanded view of lawful incidental civilian effects i.e. including the effect on civilian morale.²³¹

H. Bridges

²²⁹ Bruce Wallace, *Canadian Aces over Kosovo*, MACLEAN'S, Mar. 27, 2000, at 21.

²³⁰ COLLATERAL DAMAGE, *supra* note 5, at 43, 45 (stating respectively that the attack on RTS facilities "stretches the meaning of 'effective contribution to military action' and 'definite military advantage' beyond the acceptable bounds of interpretation." and "even if that building could have been properly considered a military objective ... that attack would have violated the rule of proportionality").

²³¹ See e.g., Dunlap, *supra* note 67.

The destruction of bridges in the NATO campaign against Serbia caused a certain amount of adverse comment.²³² NATO's 1999 strikes were moderately effective against Serbia's bridges, destroying 70% of the Danube road bridges and 50% of such railway bridges.²³³ To a lesser extent, concerns were expressed about such targets in the Gulf War. In the main, these Gulf War concerns were directed to the issue of the taking precautions in the attack, especially in relation to the timing of the strikes, being the daytime. Critics alleged that nighttime attacks would have endangered fewer civilians.²³⁴

The major complaint against NATO's strikes on Serbian bridges was that in the context of NATO's war against Serbia "bridges (had) become irrelevant for the military effort."²³⁵ In a similar vein, Human Rights Watch complained about attacks against "seven bridges that were neither on major transportation routes nor had other military functions."²³⁶ A more nuanced general criticism of such targeting is that which holds bridges cannot be treated as military objectives *per se*. In this view "the status of bridges ... depends entirely on the situation."²³⁷

²³² See e.g., Egorov, *supra* note 16, at 185.

²³³ ANTHONY H. CORDESMAN, THE LESSONS AND NON-LESSONS OF THE AIR AND MISSILE CAMPAIGN IN KOSOVO 156, 184 (2001) (citing U.S. Dep't of Defense estimates).

²³⁴ NEEDLESS DEATHS, *supra* note 2, at 4; Hampson, *supra* note 51, at 48; CIVILIAN DEATHS, *supra* note 5, at summary 7.

²³⁵ Bothe, *supra* note 99, para. 3.

²³⁶ CIVILIAN DEATHS, *supra* note 5, at summary 1.

²³⁷ Kalshoven, *supra* note 11, at 42; Hampson, *supra* note 51, at 49 (offering the same opinion, although Hampson seems to find bridges meet the threshold of military objective without undue analysis).

Bridges, like electrical systems, would appear to warrant such a conditional status. The 1956 ICRC Draft Rules permits targeting those "lines and means of communication (railway lines, roads, bridges, tunnels and canals) which are of fundamental military importance."²³⁸ United States military authorities conceded this very point in the Gulf War by targeting only those "railroads and bridges connecting Iraqi military forces with logistical support centres."²³⁹ As already noted, NATO's attacks on Serbia's infrastructure specifically including bridges "degraded the ability of the FRY military to perform command and control and to resupply or reconstitute its forces"²⁴⁰ thus providing the requisite definite military advantage.

The pairing of bridges and electrical systems in the above statement hints at a very important aspect of targeting. That aspect is the synergistic effects *between* target sets. In a military sense, destroying bridges may offer a given level of military advantage. However, when paired with an additional degradation of the enemy's electrical system, the combined military advantage may increase by more than a simple addition of the two separate effects.²⁴¹ The necessity to sometimes attack entire target sets has been made. However, the above statement demonstrates a similar effect can apply between target sets.

²³⁸ 1956 ICRC Rules, *supra* note 30.

²³⁹ PERSIAN GULF CONFLICT INTERIM REPORT, *supra* note 191, at 4-2.

²⁴⁰ Press Release, *supra* note 104.

²⁴¹ For example, a lack of electricity may degrade the general enemy ability to repair facilities including bridges. Likewise, destruction of military C3 facilities may be rendered more critical if it is tied to a simultaneous destruction of civilian electronics production to deprive the military of replacement and repair parts.

In many senses, militaries are systems of systems. There are built in redundancies and deliberate synergistic relations created. These links and connections apply within the military and can apply between the military and its supporting civil society. By way of example the military may have an actual back up plan or at least a ready capability to use the civilian telephone or television system if its own communications are destroyed. Military units far from the battle and apparently of no immediate military utility may be part of a reserve. Depriving the enemy of the ability to move such reserves apparently unconnected to any immediate concrete and direct military advantage deprives the enemy of potentially valuable options and flexibility. In arguing for excessively strict definitions of military objective, many critics ignore these effects. A modicum of analysis reveals that such redundant resources, military or civilian, do make an effective contribution to military action and their destruction can offer the requisite definite or even concrete and direct military advantage.

As Professor Dinstein points out, bridges qualify under at least three if not all four of the initial criteria for a military objective under Protocol I Article 52 (2), being: nature; location; purpose; and use making an effective contribution to military action.²⁴² His conclusion that "bridges are among the clearest of military targets" seems only logical.²⁴³ While if strictly speaking one should not accord bridges automatic military objective status, there is a strong presumption that bridges are military objectives absent a very unusual fact

²⁴² Dinstein, *supra* note 26, at 15.

²⁴³ Professor Yoram Dinstein, *The Thirteenth Waldemar A. Solf Lecture in International Law*, 166 MIL. L. REV. 93, 107 (2000). Professor Dinstein's opinion is reflected in the public's mind as witnessed by a series of movies implicitly accepting the military importance of bridges: *THE BRIDGE OVER THE RIVER KWAI* (Columbia Pictures 1957); *A BRIDGE TOO FAR* (United Artists 1977); *THE BRIDGE AT REMAGEN* (United Artists 1969).

pattern. These conclusions are supported by the “dogs that didn’t bark” being the absence of questioning of the status of bridges as military objectives by Middle East Watch and the ICTY Committee despite this issue being raised with both.²⁴⁴

Critics of targeting bridges are mainly concerned about the direct and to a lesser extent, longer-term collateral damage.²⁴⁵ Middle East Watch criticized strikes against Iraqi bridges only in the context of the timing of the attacks. It believed that daylight bombing increased the number of civilians killed during the attacks.²⁴⁶ Likewise, Amnesty International was more concerned about the civilians killed during the attacks on Serbian bridges than questioning the attacks on the bridges *per se*.²⁴⁷ As the earlier argument concluded, bridges are generally military objectives. Thus, the prime concern in most targeting of bridges is collateral damage. This conclusion is buttressed by the nature of the concerns expressed by Middle East Watch et al. These concerns implied that the less incidental civilian damage in striking any given bridge, the more likely the bridge was to be a lawful target. However, certain commentators do argue for a strict interpretation of military objective in relation to bridges.²⁴⁸ Thus, this issue evidences of decreased tolerance for collateral damage but cannot be used to support either a decrease or increase in the scope of military objective.

²⁴⁴ NEEDLESS DEATHS, *supra* note 2, at 8-14; ICTY COMMITTEE REPORT, *supra* note 2, para. 6 (citing both CIVILIAN DEATHS, *supra* note 5, COLLATERAL DAMAGE, *supra* note 5 raising this issue but not dealing with it in the ICTY Committee analysis of military target paras. 35-47).

²⁴⁵ Some concern has been expressed about targeting bridges as such apparently aside from collateral damage issues. See Egorov, *supra* note 16, at 185; Bring, *supra* note 16, at 3-4; Bothe, *supra* note 99, para. 3.

²⁴⁶ NEEDLESS DEATHS, *supra* note 2, at 4-5.

²⁴⁷ See e.g., COLLATERAL DAMAGE, *supra* note 5, at 2-3; see also CIVILIAN DEATHS, *supra* note 5, at 5.

²⁴⁸ Bring, *supra* note 16, at 3-4.

I. Retreating Forces

Including this issue in the section on controversies is at least somewhat misleading. There is no real legal controversy in this regard. Retreating enemy forces, absent surrender, are clearly lawful targets. The primary incident that brought out this legal non-controversy was the Coalition attacks at the end of the Gulf War on Iraqi forces retreating from Kuwait along the road to Basra.²⁴⁹ Despite this lack of contention, this thesis will outline the issue for what light it sheds on the relationship of military objective and incidental civilian losses.

A further reason to consider this issue is that it is from such non-legal, non-military motivations that some other law of armed conflict norms have emerged. Prohibitions on poison, chemical warfare, lasers and anti-personnel land mines are examples of such norms. The operative motivation is that public sentiment, sometimes including the military community, considers that some things even in war are just not fair or are not proper. An additional reason to consider this issue is its novelty and its indication of a potential resurrection of some notion of chivalry.

This incident gave rise to a suggestion that “soldiers retreating in disarray – as epitomized by the Iraqi land forces during the Gulf War ... should not be further attacked.”²⁵⁰ Françoise Hampson, while conceding the complete lawfulness of such targets, questions the wisdom and morality of such “turkey shoots”.²⁵¹ While recognizing the practical difficulties,

²⁴⁹ Hampson, *supra* note 51, at 53-54.

²⁵⁰ Dinstein, *supra* note 26, at 18.

²⁵¹ Hampson, *supra* note 16, at 107; Hampson, *supra* note 51, at 53-54.

she suggests a new principle, being that of targeting in the context of war aims to deal with such situations.²⁵²

It is interesting to note regarding this situation, that United States authorities while strongly, and in legal terms very convincingly, defending the attacks on the retreating Iraqis sounded somewhat defensive about these particular strikes. They mentioned their warnings to Iraqi soldiers "that their tanks and other vehicles were subject to attack, but that Iraqi soldiers would not be attacked if they abandoned their vehicles."²⁵³ They continued with a reference to their attempts to minimize Iraqi military casualties. The law of war requires neither warnings to the enemy military nor minimization of enemy military casualties. These explanations implicitly recognized that factors other than those related to current law of armed conflict norms were at play in this situation.

The issue of the appropriateness of attacking military forces retreating in disarray is a subset of the public's decreased tolerance of casualties unrelated to obvious military benefit. This is not a legal issue in that attacks on retreating, non-surrendered forces are clearly lawful. However, this controversy does indicate that to some, casualties, even military casualties, seem to be acceptable only if linked to very immediate and concrete military advantage. The public uneasiness with certain enemy combatant casualties implies, especially because it is not a legal concern, that there is a clearly complementary relationship between military objective and the public's view of acceptable collateral damage. The level

²⁵² Hampson, *supra* note 16, at 107; *see also infra* Part V.L.

²⁵³ FINAL REPORT, *supra* note 146, app. at O-34.

of acceptable collateral damage and the range of acceptable military objectives are both shrinking in the views of those concerned about these particular targets.

J. Listing Military Objectives

The current definition of military objective in both customary international law and in the treaty, being Protocol I Article 52 (2), is a generic one. No list or even examples are given. It is an abstract concept that users, in theory at least, must apply to every proposed target. Among other drivers of this requirement for individualized consideration is that in Article 52 (2) that demands that the criteria be applied in the circumstances ruling at the time. As Professor Kalshoven says this means targeters must not rely “exclusively on abstract categorizations in the determination of whether specific objects constitute military objectives.”²⁵⁴

Some critics of the current definition of military objective believe this definition is too subjective and leaves too much discretion to the military personnel making the targeting decisions. Other critics feel that the current definition is too indefinite, offers inadequate guidance and leads only to controversy and the injection of non-legal and non-military considerations. One possible solution for both groups of critics is to move from an abstract generic definition to a more concrete listing of legitimate military objectives.

²⁵⁴ Frits Kalshoven, *Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974-1977, Part II*, 9 NETH. Y.B. OF INT'L L. 107, 111 (1978).

The 1923 Hague Air Rules attempted to formulate a comprehensive list of military objectives in the context of aerial bombardment.²⁵⁵ As mentioned, these rules were never adopted and although the generic portion of its military objective definition seems to have contributed to the eventual formulation found in Protocol I, the exclusive listing never became effective in the sense of being considered exhaustive. It was thought to be too restrictive.²⁵⁶ The desire for more precision and certainty, which underlies attempts to develop a list of military objectives of more or less exclusive nature, continued with the 1954 Hague Convention on Cultural Property²⁵⁷ and the 1956 ICRC Draft Rules.²⁵⁸ Significantly, this was not the approach taken by the drafters of Protocol I. Their rejection of such a list-definition in favor of a generic description is strong evidence that a list of military objectives was either not practical or not desirable.²⁵⁹ However, the particular drive for more precision continued to surface. In the drafting of the 1994 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea (San Remo Naval Manual)*, the merits of the two types of definitions were debated and a combination definition was finally used.²⁶⁰

²⁵⁵ Hague Air Rules, *supra* note 29, art. 24 (2).

²⁵⁶ Fleck, *supra* note 54, at 44.

²⁵⁷ 1954 Hague Convention on Cultural Property, *supra* note 216, art. 8 (1) (a).

²⁵⁸ 1956 ICRC Rules, *supra* note 30.

²⁵⁹ A review of the relevant portions of the ICTY COMMITTEE REPORT, *supra* note 2, paras. 1994-2038, and BOTHE, *supra* note 37, at 318-27, fails to reveal any consideration of a listing of specific military objectives. Likewise LEVIE, *supra* note 117, at 176-94, is silent in this regard save for a single suggestion that "it might be useful to supply a list of examples of military objectives which, though not exhaustive, might serve as a guide to those concerned." *Id.* at 188.

²⁶⁰ Fleck, *supra* note 54, at 48-49.

A variety of listing options is possible. The drafters of the *San Remo Naval Manual* considered four approaches to defining military objective. Three of those options included a list as at least a component. They considered:

- “(a) a general definition of military objective;
- (b) a list of objects constituting military objectives;
- (c) a general definition and a list; or
- (d) the converse of (a), (b), or (c) indicating objects exempt from attack.”²⁶¹

Professor Dinstein has also proposed a list of military objectives. He finds “Article 52 (2)’s definition leaves a lot to be desired. Its language is abstract and generic, and no list of specific military objectives is provided (if only on an illustrative, non-exhaustive, basis). ... The text lends itself to ‘divergent interpretations’.”²⁶² He believes only “an abstract statement with a non-exhaustive catalogue of concrete illustrations – can effectively avoid vagueness.”²⁶³ On another occasion, he elaborated “no abstract definition of military targets can be fully satisfactory without an accompanying (and agreed upon) list itemizing at least prime objectives laid bare to attack.”²⁶⁴ He admits this is an ambitious task. “A useful list of

²⁶¹ William J. Fenrick, *Introductory Report: Military Objectives in the Law of Naval Warfare*, in *INTERNATIONAL HUMANITARIAN LAW APPLICABLE TO ARMED CONFLICTS AT SEA* 4 (W. Heintschel & Heinegg eds., 1991).

²⁶² Dinstein, *supra* note 26, at 4.

²⁶³ *Id.* (citation omitted).

²⁶⁴ Dinstein, *supra* note 93, at 5.

military targets must be quite elaborate, but ... it should leave a margin of appreciation for the commander on the spot.”²⁶⁵

Yet, for all the undoubted benefits of certainty, Professor Dinstein’s proposal also sets out the reasons why such a list, even as a supplement to an abstract definition, is not practical or even desirable. If the drafters of Protocol I could not agree on even a non-exclusive list, subsequent negotiators are unlikely to succeed. That the *San Remo Naval Manual* drafters may have succeeded somewhat is not determinative. Naval warfare, whatever its other challenges, does not pose the same risks for the number of non-combatants and civilian objects that land warfare and aerial bombardment do. Naval warfare involves many fewer targets and target sets. It is generally somewhat easier to distinguish military objectives from civilian objects at sea than on land. In a military objective sense, it is much less complex than its land and air counterparts.

Additionally, any listing of military objectives, even in a non-exhaustive sense, risks losing one of the main benefits of the generic definition. That abstract definition should contract and only expand in response to the military circumstances ruling at that time. This should keep war’s destruction to a minimum. To simplify somewhat, short wars should tend to have shorter target lists. Only longer wars should have longer target lists. Limited wars should have limited target lists.²⁶⁶ From a military perspective, a generic definition has the advantage of tending to be more adaptable to a change in technology, war fighting or

²⁶⁵ *Id.*

²⁶⁶ Fenrick, *supra* note 7.

strategy. Conflicts will not always wait for the latest law of armed conflict targeting negotiations to successfully conclude.

The pressure to list military objectives is going to have a tendency to decrease the number of military objectives or at least prevent any expansion of the range of military objectives. Proponents of such an initiative may deny this. They may even advocate listing as a way to preserve discretion to target militarily relevant objects.²⁶⁷ However, even when the proposed list includes a general definition and is expressly non-exhaustive, the practical effect will be to tend to limit the permitted targets to those specified. Any targeting outside the specified list will require an extra justification and critics will argue that anything not obvious enough to be listed should not be considered a target. Such lists, being extremely controversial will not be readily revised and will tend to become out-dated. Inclusion or exclusion on the list will inevitably involve considerations of how much danger to the civilian population will result from targeting such objects.

Thus, the dynamic of this proposal indicates a complementary, albeit perhaps weak, relationship between military objective and proportionality i.e. the same pressures at work to decrease the lawful range of military objectives will be at work to decrease the quantum of acceptable collateral damage. The same complementary relationship is evident even if this initiative should result in an increased range of lawful military objectives. As that range grows, an increase in acceptable collateral damage will have to be accepted.

K. Partial Abandonment of the Military Connection in Military Objective

²⁶⁷ See Dinstein, *supra* note 243, at 107.

Colonel Dunlap has proposed a radical change in targeting. He suggests a “revolutionary re-interpretation of ‘military objective’ so as to de-link the now required nexus to a contribution to a specific military action, and to explicitly include those civilian objects whose loss weakens the nation’s collective will to continue the conflict.”²⁶⁸ While still protecting those objects necessary for the civilian population’s survival, he suggests that other “personal property of the sentient, adult population” and “things such as banks and financial institutions. Factories, plants, stores, and shops that produce, sell, or distribute luxury products” become lawful targets.²⁶⁹ This analysis need not deal with those aspects of his proposal that would restrict the application of this new regime to morally reprehensible regimes. This thesis is concerned with his proposal only for its treatment of military objective. The just war aspects of his article are beyond the scope of this thesis.

His proposal to expand the definition of military objective is impractical on a number of grounds. For example, the law of armed conflict tends to develop incrementally and in conventional directions. Therefore, the proposal’s very novelty argues against it. Further, the proposal’s application would effectively be restricted to technologically developed militaries only. This would lead to undesirable asymmetries. Those subject to such attacks would be unable to respond in kind. The less technologically sophisticated recipients would tend to lash out perhaps using equally novel but illegal means. That having been said, the motivation of the proposal is consistent with the very basic dynamic of the law of war i.e.

²⁶⁸ Dunlap, *supra* note 67, at 17.

²⁶⁹ *Id.* at 14.

how can a state impose its political-military will on its opponent with a minimum of true human suffering.

Colonel Dunlap's proposal to dramatically increase the universe of lawful military objectives demonstrates a clearly complementary relationship between military objective and the collateral damage aspect of proportionality. This proposal accepts a much greater range of lawful civilian effect than the current legal regime. Indeed, the change proposed intends to cause these wider civilian effects. Certainly, the increased civilian effect is of the non-lethal variety. Nevertheless, the objective in hitting the targets he proposes is to so influence the civilian population that they in turn pressure their leaders to accommodate the attackers' demands.

L. Military Objectives in the Context of Explicit War Aims

Françoise Hampson has proposed the addition of a new element in the definition of military objective. It would impose a mixed functional/proportionality test. The proposed additional requirement is that "the destruction etc. of the objective is necessary to the achievement of the war aim."²⁷⁰ In another forum she said:

[W]hat is needed is a qualification to the definition of military objectives. Either it should require the likely cumulative effect on the civilian population of attacks against such targets be taken into account, or the same result might be achieved by requiring that

²⁷⁰ Hampson, *supra* note 51, at 51.

the destruction of the object offers a definite military advantage in the context of the war aim.²⁷¹

It would apply to civilians, civilian objects or military personnel.²⁷² It would be a restrictive extra criteria to avoid the obviously detrimental effects of making legitimate any objective simply because it advanced a party's war aims.

Françoise Hampson intended this new rule to address the sorts of problems she saw with the onerous effects on the Iraqi people of the Coalition's destruction, albeit lawful, of Iraq's electrical supply system during the Gulf War. She also saw it limiting what were, in her view, unnecessary casualties visited on Iraqi armed forces by some of the Coalition's attacks.²⁷³

This proposal might be unobjectionable in theory. However, given the compelling need to keep the law of war as simple as possible,²⁷⁴ before any complexity or even addition is made to the law in this area, there should be a demonstrable benefit outweighing both any negative aspects of the proposal plus the inherent undesirability of added complexity.

The first thing to note is that its effect will not always be benign. Certainly, Françoise Hampson proposes the rule as an additional restriction. But even as a restriction, war aims criteria, being variable, will both restrict and expand the lawful target list depending on the

²⁷¹ Hampson, *supra* note 16, at 100.

²⁷² *Id.* at 107.

²⁷³ Fenrick, *supra* note 7 (alluding to this proposal).

²⁷⁴ See e.g., Doswald-Beck, *supra* note 13, at 34 (stating "[T]he more complex the rules, the less likely it is that they will be followed accurately").

particular armed conflict.²⁷⁵ However, perhaps the most compelling argument against this proposal is the difficulties and complexities it adds to legal targeting decisions. Articulating war aims is not as simple as the proposal seems to assume. A state may have a variety of aims in going to war. They will range from the altruistic e.g. restoring international peace and security or liberating another country to the purely economic e.g. protecting sources of oil, redressing historical injustices a.k.a. settling old grudges or currying favor with a powerful potential ally. States may have these aims simultaneously.

Coalition warfare adds yet another level of complexity to the proposed rule. Different states within the same coalition are likely to have different, if not contradictory, war aims. Coalition targeting can be extremely complicated as it is. Adding this layer of complexity to such operations is simply not practical.

The next difficulty is semantic. There is no firm definition of “aim”. It can easily be confused, deliberately or otherwise, with motivation, ulterior reason or most noble of purposes. War aims exist on a number of levels i.e. the strategic, the operational, the strictly military and the geo-political. All of the preceding versions of war aims can dramatically shift mid-conflict sometimes on multiple occasions.²⁷⁶

²⁷⁵ Campbell, *supra* note 2 (citing a non-governmental organization spokesman who attributes a perceived increase in incidental civilian casualties in the 2001 U.S. bombing of Afghanistan compared to NATO’s 1999 bombing of Serbia, to among other things, “the campaign’s objectives”).

²⁷⁶ See e.g., IGNATIEFF, *supra* note 7, at 51 (citing the change in NATO objective during its 1999 bombing campaign against Serbia “Once the bombing began, the objective shifted from getting Milosevic back to the negotiating table to ‘prying his hands from the levers of power’, as one NATO general put it.”).

The asymmetrical effect of this proposal also causes concern. Using the Gulf War as an example, the war aims of the United States, for which this was not a total war, would presumably have been limited by this proposed requirement. However, for Iraq, for whom the conflict was a total war, the restrictions would have been looser, giving Iraq a greater discretion in targeting. Such uneven legal constraints are dangerous for the law of war and are to be avoided if possible.

For all of the above reasons, this proposal is unlikely to prove workable. The existing law of war requirements for considering the circumstances ruling at the time and for assessing proportionality, the latter perhaps over a somewhat expanded time frame, are likely to accomplish most of what Françoise Hampson so sensibly desires.

The proposal to require an additional element in the targeting process so that the targets' destruction is necessary in the context of the attacker's war aims is expressly designed to limit collateral damage. In itself, and particularly when married with Françoise Hampson's related proposal to integrate an element of collateral damage into the definition of military objective, this will also have the effect of substantially narrowing the definition of military objective. Thus, it demonstrates a complementary relationship between military objective and incidental civilian losses i.e. acceptable collateral damage is decreased and the acceptable range of military objectives tends to decrease. Indeed, this proposal demonstrates an even more dramatic complementary relationship between these concepts in that it could effectively expand the term collateral damage to encompass certain enemy combatants i.e. those whose destruction did not directly advance the attacker's war aim.

M. Addition to the 1981 Conventional Weapons Convention

Peter Rowe has proposed an addition to the 1981 Conventional Weapons Convention to protect concentrations of civilians from air-delivered PGM. The addition proposed is:

It is prohibited to make any military objective located within a concentration of civilians the object of attack, except when such military objective is clearly separated from the concentration of civilians, and all feasible precautions are taken with a view to limiting the effects of the attack to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.²⁷⁷

This would impose a threshold burden not any balancing requirement. He intends all feasible precautions to include consideration of: weapon malfunction, tactics such as the height at which the attack is carried out, attacker air crew risk not automatically taking priority over incidental civilian losses and the effect of defensive measures. Arguably, this is a more onerous burden for attackers than the current law in Protocol I.

Peter Rowe's proposal is expressly designed to protect civilians.²⁷⁸ Targeters are to explicitly apply its protections before any balancing of proportionality factors. It is a proposed additional precaution in the attack. Thus, its effect is to exclude certain objects from the range of lawful military objectives before any consideration of proportionality. It thus exhibits a tendency to narrow the range of military objectives and decrease the level of acceptable incidental civilian losses i.e. it indicates a complementary relationship between the concept of military objective and collateral damage.

²⁷⁷ Rowe, *supra* note 104, at 162.

N. Miscellaneous Initiatives, Controversies and Recent Law of War Developments

Although not outlined here in any detail, for the purposes of further trying to discern the relationship and dynamics of military objective and incidental civilian losses this paper will also consider a series of law of armed conflict events and issues. They are the Convention on the Prohibition or the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction²⁷⁹ (APM Convention), the depleted uranium controversy and the dramatic increase in use of PGM.

The recent APM Convention was motivated by a desire to lessen the number of civilians incidentally killed and wounded by the usage of anti-personnel land mines.²⁸⁰ Concerns were also expressed about the related, but indirect collateral effect of such usage by way of preventing the civilian population from continuing with their daily activities such as farming and transporting themselves and goods etc.²⁸¹ Clearly, this treaty demonstrates a decreased tolerance for collateral damage. Its effect on military objective is harder to discern. It certainly does not restrict the legal definition of military objective. Its indirect

²⁷⁸ *Id.*, at 161.

²⁷⁹ International Committee for the Red Cross, *International Humanitarian Law, IHL Database, Treaties and Documents*, at <http://www.icrc.org/ihl> (last visited 13 Mar. 2002) (reproducing certain international humanitarian law materials).

²⁸⁰ See e.g., International Committee for the Red Cross, *1997 Convention on the Prohibition of Anti-Personnel Mines and on their Destruction*, at <http://www.icrc.org/icrceng.nsf/c1256212004ce24e4125621200524882/eb4ad9edcfa54c72412568b8004e4e71?OpenDocument> (last visited 3 Apr. 2002) (stating "Anti-personnel mines cannot distinguish between soldiers and civilians and usually kill or severely mutilate their victims. Relatively cheap, small and easy to use, they (have) proliferated by the tens of millions, inflicting untold suffering and wreaking social and economic havoc ...").

²⁸¹ International Campaign to Ban Landmines, *Humanitarian Mine Action, Post-Clearance Development and Land Use*, at <http://www.icbl.org/lm/2001/exec/hma.html#Heading514> (last visited 7 Apr. 2002) (describing efforts to return land to civilian use mainly farming but also for a variety of uses including transportation).

effect on the concept of military objective is likewise hard to detect. Thus, its implication for the relationship between incidental civilian losses and military objective is unknown. The same dynamic is at work in the controversy over cluster munitions.²⁸² The main complaint against such weapons is that they effectively act as anti-personnel land mines when they fail to detonate upon deployment.

The use of depleted uranium munitions has resulted in a controversy centered upon two effects.²⁸³ The first is the potential long-term environmental damage such munitions might have i.e. the collateral damage done. The second effect is the possible long-term harm to combatants. This later effect is most accurately categorized as one concerning potential unnecessary suffering inflicted upon combatants. This controversy thus indicates a lower tolerance for incidental civilian losses but seems to have no effect on the range of acceptable military objectives. Thus, its implication for the relationship of military objective to collateral damage is unknown.

The vastly increased use of PGM has the general effect of reducing collateral damage. Indeed, PGM might be credited with the historically low levels of incidental civilian losses in the three conflicts mainly used in this thesis.²⁸⁴ At the same time, the use of PGM may have a tendency to increase the range and scope of things that will be considered lawful military

²⁸² See e.g., International Committee for the Red Cross, *Explosive Remnants of War*, at <http://www.icrc.org/eng/ihl> (then *Humanitarian Law Issues* then *Explosive Remnants of War*).

²⁸³ Paolo Benvenuti, *The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, 12 EUR. J. INT'L L. 503, 511-13 (2001).

²⁸⁴ Fenrick, *supra* note 7 (using the figures in Parks, *supra* note 18, at 154 plus his own from Operation Allied Force to demonstrate a general dramatic downward trend in deaths per ton of bombs dropped from 1937 to 1999).

objectives. If certain decision-makers feel they may be able to destroy a civilian object with no or little civilian death or injury, they may be tempted to ignore traditional distinction criteria at least as that doctrine relates to objects. Certainly, the use of PGM will not in itself restrict the range or scope of the concept of military objective. Thus, this development demonstrates a potentially inverse relationship between military objective and incidental civilian loss i.e. a possible increase in the scope of military objective is made more acceptable by the decrease in collateral damage.

O. Summary of Conclusions as to Relationship Revealed by Dynamics

My conclusions as the implications of the issues studied for the relationship of military objective to incidental civilian losses can be summarized in the following chart.

	LOAC Issue	Tendency Effect on Collateral Damage	Tendency Effect on Range of Military Objectives	Type of Relationship Implied
B	General Public Concern for Collateral Damage	Decreased	Increased or decreased	?
C	Military Objective Customary – Conventional Difference	Unknown	Increased	?
D	Proportionality Customary – Conventional Difference	Possibly Increased	Unknown	?
E	Civilian Morale	Considered with Electrical Systems and Media Outlets		
F	Electrical	Decreased	Decreased	Complementary

	Systems			
G	Media Outlets	Increased / Decreased	Increased / Decreased	Complementary
H	Bridges	Decreased	Increased or Decreased	?
I	Retreating Forces	Decreased	Decreased	Strongly Complementary
J	Listing Military Objectives	Possibly decreased / increased	Decreased / Increased	Possibly Complementary
K0	Partial Abandonment of Military Connection	Increased	Increased	Complementary
L	Military Objectives in Context of War Aims	Decreased	Decreased	Strongly Complementary
M	Addition to 1981 CWC	Decreased	Possibly decreased	Complementary
N1	APM Convention	Decreased	Unknown	?
N2	Depleted Uranium	Decreased	Unknown	?
N3	PGM Trend	Decreased	Possibly increased	Potentially Inverse

The overall conclusion that can be drawn about the relationship of military objective and incidental civilian losses is that there is a general but weak and sporadic tendency for these two terms to have a complementary relationship. This confirms the analysis of the inherent nature of the relationship discussed in Section IV B on the Inherent Relationship of military objective to incidental civilian losses.

VI. Implications of Relationship of Military Objective to Collateral Damage / Proportionality

The relationship between military objective and incidental civilian losses is mediated by the common element of military advantage. This strongly implies that for the most part the decision-makers in this regard must be military commanders or at least military personnel. Certainly, these decisions can sometimes be so critical that non-military persons might play some role before, during and after the targeting process. However, such non-military persons should have a reasonable appreciation of the military factors if their input or review is to be of real value. This conclusion accords with the basic dynamic of the law of war outlined at the beginning of this thesis that set out a fundamental balancing of military and humanitarian factors. Anyone seriously interested in applying or analyzing the law of armed conflict must properly consider both its military and humanitarian dimensions. Such balancing is specifically required in the proportionality calculus.

The general practical necessity for military targeting decision-makers has led most commentators to assess the legality of various law of armed conflict decisions from the point of view of the "reasonable military commander".²⁸⁵ However, at least one commentator takes some issue with this standard.²⁸⁶ In Michael Bothe's opinion, such a military decision-maker must be defined in "civilian terms" which he expressly assumes is democratic. He says these military decision-makers should reflect societal civilian norms. He assumes this would produce decisions that are more humane.

²⁸⁵ ICTY COMMITTEE REPORT, *supra* note 2, para. 50; Fenrick, *supra* note 80, at 5; Fenrick, *supra* note 7.

²⁸⁶ Michael Bothe, *The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY*, 12 EUR. J. OF INT'L L. 531, 535 (2001).

This view might be superficially attractive to some. However, it ignores the situation of military decision-makers in non-democratic regimes. Obviously, the law of armed conflict aspires to universality. As such, it must be applicable across a range of political systems. It is unrealistic to expect military decision-makers in autocratic regimes to reflect democratic norms. The non-democratic leadership of those military decision-makers likely would not support such democratically induced norms. A better i.e. more universal basis for such decisions is one premised upon a basic individual moral code grounded in the law of war. It is a more practical guide across a broader spectrum of societies with varying degrees of democratic values.

However, does not an emphasis on military decision-making risk upsetting the required balance in the law of war between military factors and humanity in favor of the former? It might, unless the central place of morality in the law of armed conflict is recognized. Fortunately, such recognition is of long standing. One example is found in the 1863 Lieber Code. "Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God."²⁸⁷ In more modern times, "There is in other words a moral basis for the rules of war."²⁸⁸ and "It must never be forgotten that the law of war ... began mainly as a matter of religion and ethics."²⁸⁹ Thus, the law of war's role is to "reinforce and particularize individual morality."²⁹⁰ This is what is

²⁸⁷ General Orders No. 100 (Lieber Code), art. 15, *reprinted in* THE LAWS OF ARMED CONFLICTS 3 (Dietrich Schindler & Jiri Toman eds., 3rd ed. 1988).

²⁸⁸ Thomas Nagel, *War and Massacre*, 1 PHIL. & PUB. AFF. 123 (Winter 1972).

²⁸⁹ GEOFFREY BEST, *WAR AND LAW SINCE 1945* at 289 (1994).

²⁹⁰ Fenrick, *supra* note 80, at 18.

behind various commentators' exhortations to good faith application of the rules. Calls for good faith are essentially appeals to the individual morality of those charged with making critical law of war decisions.

This means that military commanders making targeting, and other law of war, decisions must be moral human beings. Many of the most difficult decisions will require a decision that is in essence a moral one. This implies that military commanders should be selected, at least in part, for their moral sense. The callous and self-serving should not be selected for advancement. They will not have the tools with which to make proper law of war decisions (or indeed many other non-law of war decisions required of such leaders). Technical ability, even mastery of the legal rules, will be insufficient. This moral requirement also implies that training for senior military officers should include studies in ethics and morality. Advanced academic study for such officers should include the humanities and not simply the sciences and administration. None of these recommendations, even in combination, will guarantee an ethical and moral officer corps capable of properly applying the laws of war. However, such initiatives will foster a group that is much more likely to comply with the laws of armed conflict.

There are other follow-on implications from the necessity for pre-dominantly military decision making in the targeting process. The first such implication is the necessity of the military to educate the public in the law of armed conflict. All militaries depend upon their civil societies for support. Such support will not be forthcoming unless the public, even if at a rudimentary level, understands the basis upon which the military makes critical decisions, including law of armed conflict decisions. The public must understand that these decisions

balance military *and* humanitarian concerns. Among the further basics the public must appreciate are: wars are nasty unpredictable events; despite that nastiness certain legal rules apply; such rules can only minimize and not eliminate suffering; and their military personnel make good faith efforts to comply with the law of armed conflict or face serious consequences.

The public's support, input and even criticism will be more valuable if it is based in military and legal reality. The public perception of the law of war regime, correct or not, can have an influence on military policy. Ignorance will work against the military's long-term interests. One commentator has said:

[P]oliticians and military leaders would almost certainly be far better off if their speeches, briefings and public relations exercises stressed the true risks and uncertainties of war, stated that losses and collateral damage were inevitable, and educated the media, the public (and politicians) in the friction of war. It is far better to be self-critical and pessimistic, and create realistic expectations, than to treat war as an advertising campaign.²⁹¹

Law of armed conflict education is particularly important for politicians who might insert themselves in such decisions. NATO political leaders,²⁹² presumably including American and certainly British government officials involved themselves in some of the targeting decisions during the NATO bombing campaign against Serbia.²⁹³ Such involvement, at least in sensitive cases, can be expected in the future. The risks involved with uneducated part-time potential targeters are great. "[T]here can be no nastier a militarist than a civilian

²⁹¹ CORDESMAN, *supra* note 233, at 137.

²⁹² Press Release, *supra* note 104.

²⁹³ Rowe, *supra* note 104, at 157-58.

one.”²⁹⁴ Such officials have usually not devoted their professional lives to matters military. This combined with their perhaps over-sensitivity to short term political considerations could make for disastrous or even illegal targeting decisions.

Additionally, the military should recognize that politicians and the public receive much of their information and impressions from the academic community. Therefore, this particular audience should not be forgotten in any law of war education campaign. If the military hopes to benefit from reasonably informed criticism, it would be wise to educate and communicate with those academics who may assume the role of law of armed conflict commentators. Such education and dialogue should not be limited to those academics viewed as reasonable or military-friendly. One can learn even from one’s critics and adversaries. Occasionally, they are even correct.

The next follow-on implication from the essentially military nature of targeting decisions is that despite these decisions being essentially military, there should be at least occasional outside review of such decisions. Such review is not necessarily a microscopic second-guessing. However, it may legitimately be an outside review with a significant civilian component. This review is necessary to ensure that the targeting decisions were correct and properly included the humanitarian factors as well as the military factors that make up targeting decisions.

Modern societies have witnessed, if not the death, at least the dramatic decline of deference to authority. Democratic populations question their political, religious, media and

²⁹⁴ GEOFFREY BEST, HUMANITY IN WARFARE 27 (1980).

economic elites. It is unrealistic to expect that military leadership will be immune from this phenomenon. Military decisions in all regards will be subject to some form of review. Aside from being inevitable, such a process is healthy. Properly conducted, such reviews will make for better military decisions including targeting ones. It is too easy for relatively closed cultures such as the military to become complacent or too narrowly focused on its own immediate needs.

The inevitability and desirability of a certain level of outside review means that the military should be more open about its targeting decisions and processes. Total rejection of review will in many quarters be attributed to bad faith or even guilt. If the military in a given targeting situation has done a proper job, it should not fear scrutiny. If it has made mistakes, the professional response should be to admit errors and learn from them. Such a learning process may be assisted, albeit with some organizational pain, by a level of review. On occasion, this review may be outside review.

The ICTY Committee reviewed the NATO bombing of Serbia.²⁹⁵ It did not recommend commencing any investigations in that regard. However, it noted that NATO responses were not always as helpful as they might have been, being “couched in general terms and fail[ing] to address the specific incidents.”²⁹⁶ In a different forum, one of the authors of that report noted concerning the NATO response to the Committee’s inquiries, that “Security concerns or a desire to minimize public relations vulnerability appear to have restrained decision-makers and their legal advisors from elaborating upon the underlying reasons for targeting

²⁹⁵ ICTY Report, *supra* note 2.

decisions. One might hope that such persons will be more forthcoming in future.”²⁹⁷ More cooperation with responsible outside reviewers would have long-term benefits for military targeting.

Such pressure to be more open will only increase. A proper response need not always involve completely external review mechanisms.²⁹⁸ A more moderate and practical approach that would provide a level of credible review is that advocated by those who propose national review processes.²⁹⁹ Most militaries already have mechanisms by which they or their civilian hierarchies review friendly fire incidents. Surely, an analogous procedure could be implemented for at least certain cases of incidental civilian losses. Not every such incident might warrant this scrutiny but given the tremendous resources many militaries devote to targeting even the internal benefits of such lesson learning activities make them valuable exercises. Not surprisingly, some such procedure has already been implemented in at least

²⁹⁶ *Id.* para. 90.

²⁹⁷ Fenrick, *supra* note 7.

²⁹⁸ Doswald-Beck, *supra* note 13, at 47 (stating that such an “evaluation cannot be left to totally national mechanism but must include unbiased and neutral persons.”); CIVILIAN DEATHS, *supra* note 5, at summary 8 (calling for “an independent and impartial commission” to be set up by NATO and its individual members to investigate law of armed conflict compliance during Operation Allied Force).

²⁹⁹ Editorial, *Accountability in Afghanistan*, Wash. Post, Feb. 13, 2002 (stating “[B]oth senior officers and their civilian leadership in the Bush administration have failed to carry out what should be an essential duty: mounting serious investigations of wrongful deaths, providing a full public explanation and holding U.S. officers and soldiers accountable for any improper or reckless behavior.”); Public Statement, *supra* note 209 (stating “NATO and NATO member states should also conduct their own investigation into reported breaches of the rules of war during Operation Allied Force”).

one case.³⁰⁰ In most cases, a releasable version of a credible internal review should satisfy most reasonable critics.

The relationship between military objective and incidental civilian losses is also a legal one. This fact of a legal relationship implies a need for the availability of legal advice. This is one of the reasons that Protocol I contains a requirement for the parties to that treaty to “ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol.”³⁰¹ Future trends are only likely to “increase the importance of the role of legal advisers.”³⁰²

The role of legal advisers in the targeting process includes training and advising the appropriate military personnel.³⁰³ Such advice may include the legal aspects of specific targeting decisions. On occasion, such advice will bring to the recipient’s attention a wider scope of legal discretion than the recipient assumed he or she had. It is not unknown for operational personnel to think they face a legal constraint when in law no such constraint

³⁰⁰ William M. Arkin, *Fear of Civilian Deaths May Have Undermined Effort*, Los Angeles Times, Jan. 16, 2002 (stating that Lt. Gen. Wald, then an air commander during U.S. bombing of Afghanistan “set up a special desk in the Combined Air Operations Center to examine incidents of civilian deaths.”).

³⁰¹ Protocol I, *supra* note 10, art. 82.

³⁰² Schmitt *supra* note 9, at 1087.

³⁰³ Fred Green, Remarks in a Panel on *Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity*, AM. SOC. INT’L L. PROC. 39, 64 (1992) (describing legal advisers’ roles in the 1991 Gulf War); FINAL REPORT, *supra* note 146, app. at O-3-O-4 (describing legal advisers’ roles in the 1991 Gulf War); James A. Burger, *International Humanitarian Law and the Kosovo Crisis: Lessons Learned or to be Learned*, 837 INT’L REV. OF THE RED CROSS 129 (2000) (describing legal advisers’ roles in the 1999 NATO Bombing of Serbia); Lieutenant Colonel Tony Montgomery, *Operation Allied Force Targeting: Perspective from the EUCOM Targeting Cell*, in COLLOQUIUM: LEGAL AND ETHICAL LESSONS OF NATO’S KOSOVO CAMPAIGN, AUG. 8-10, 2001 (2001) (held at the United States Naval War College, Newport, Rhode Island) (describing legal advisers’ roles in the 1999 NATO Bombing of Serbia); IGNATIEFF, *supra* note 7, at 100-01 (describing legal advisers’ roles in the 1999 NATO Bombing of Serbia); Ricks, *supra* note 6 (describing anecdotally a legal adviser’s role in the 2001 bombing of Afghanistan).

operates. In other circumstances, legal advisers can point out possible alternatives to legally accomplish the desired effect.

However, there will be times when the legal adviser's role will be to restrain the targeting decision-makers. One Canadian pilot flying in the NATO campaign against Serbia said, "The pilots would push and the lawyers would hold us back."³⁰⁴ Legal constraints in NATO's bombing of Serbia resulted in very strict rules of engagement.³⁰⁵ In 2001, during the United States bombing of Afghan targets, at least one legal adviser was reportedly required to exert such a moderating influence.³⁰⁶ While remaining advocates, especially in public, legal advisers inside the targeting process must exhibit strength of personal and professional character to offer accurate, practical and, if the situation demands, firm counsel.³⁰⁷

While the role of legal adviser is important and occasionally critical, one must recognize the limitations of that advice. Legal advisers are just that, advisers. In most military systems they have no or very limited command authority. Legal considerations are often only one of many at play in any given targeting decision. In many of the subjective decisions required in the targeting process the legal advisers' views may be no more and often less authoritative

³⁰⁴ Wallace, *supra* note 229, at 21.

³⁰⁵ IGNATIEFF, *supra* note 7, at 101.

³⁰⁶ Ricks, *supra* note 6 (stating "When clearance was sought, officials said, (the legal adviser) frequently would ask, 'Are you sure?' When faced with that question, the officials said, (the commander) would then turn to his top intelligence officer ... who tended to say they did not have total certainty about the target."). Remarkably, the tenor of the article was somewhat critical of the legal officer. Any targeting process that cannot withstand the scrutiny of a simple question "Are you sure?" is not worthy of a military professional.

³⁰⁷ Fleck, *supra* note 54, 63-64.

than the operational personnel's. Legal advisers often lack the military background to make as valuable a contribution to the targeting process as they might if they were better informed. Even those legal advisers with prior military backgrounds usually obtained their military experience years previously, often at very junior levels. That having been said, military legal advisers are often in an ideal position to properly navigate the laws of armed conflict given their dual status as lawyers and military personnel. This duality matches the twin nature of the law of war that is apparent even from its name being the "law" of "war".

A more fundamental limitation on the role legal advisers can play is simply the practical limits of law in warfare. "Increasing the number of lawyers specializing in a subject does not necessarily mean that more heed will be given to humanitarian values."³⁰⁸ Michael Ignatieff expresses a similar sensible skepticism. "The real problem with the entry of lawyers into the prosecution of warfare is that it encourages the illusion that war is clean if the lawyers say so."³⁰⁹ Over-emphasis on legality ignores both the fundamentally violent nature of war and the fundamentally moral basis for international humanitarian law. Too much can be expected of the law. While the "Western military's response to sharpened moral and political exposure has been to call in the lawyers",³¹⁰ the law and lawyers can seldom provide the moral or political comfort sought.

³⁰⁸ Fenrick, *supra* note 7.

³⁰⁹ IGNATIEFF, *supra* note 7, at 200. See generally *id.* at 197-200 (describing "The Legal War" aspect of NATO's 1999 bombing).

³¹⁰ *Id.* at 197.

This examination of the inherent and other relationship indicia between military objective and collateral damage reveals a basically complementary relationship. This makes sense given the common element of military advantage. The greater the military advantage an object represents the more likely it is to be a target and the more collateral damage it will legally justify, assuming such collateral damage is unavoidable. Certainly, the military objective assessment is based on a threshold test and the proportionality calculus is a balancing but the tendency for the two terms to move in tandem remains.

This relationship is logical but does have within it some potential dangers. Objects of great military advantage might well justify considerable incidental civilian losses. However, there is a danger that targeters seeing an opportunity to achieve a great military advantage will ignore, downplay or give insufficient weight to collateral damage concerns.³¹¹ Such a danger is heightened when time pressures mount. The quite legitimate military utility in reducing targeting decision times is exactly the sort of pressure that will increase this danger. The solution to the danger posed by under-emphasizing incidental civilian losses due to the temptingly high value of certain military objectives is to rigidly adhere to the two-phase legal targeting scheme suggested earlier. All targeting opportunities must be analyzed by asking at least these two separate questions - is the target a military objective? and is there an unacceptable risk of disproportionate incidental civilian losses?

A further implication of the relationship between military objective and collateral damage arises from the various modifying influences referred to in Section IV B. The common

³¹¹ Rowe, *supra* note 104, at 160.

linkage of military advantage in both military objective and the proportionality equation, of which collateral damage is a part, is greatly affected by:

1) different adjectives, being “definite” for military objective and “concrete and direct” in the proportionality calculus;

2) different temporal elements, albeit this difference is not as great as it might at first appear, being the relatively immediate “in the circumstances ruling at the time” for military objective and the future oriented “expected” incidental civilian losses and “anticipated” military advantage for proportionality;

3) different applications, being a threshold determination for military objective and a balancing for proportionality; and

4) different degrees of subjectivity, being fairly subjective for military objective determinations and extremely subjective for proportionality calculations.

The combined effect of these modifying factors is to render the complementary relationship between military objective and incidental civilian losses very weak, indirect and sporadic. This tenuous nature of the relationship is confirmed by examination of the various law of war issues. Of the fourteen situations examined, six exhibited a reasonably clear complementary relationship and one a possibly complementary relationship. In six cases, the relationship could not be determined and in the final situation, a potentially inverse relationship was detected between military objective and collateral damage.

The weakness of this relationship means that there will on occasion be a pressure to adopt an inverse relationship between military objective and incidental civilian losses. Examples of such pressure is the temptation to strike an object that is not a military object e.g. a civilian morale target such as a television studio just because there is no or limited collateral damage anticipated.³¹² These pressures should be resisted. Not only is it legally wrong,³¹³ it risks a gradual or not so gradual erosion of the bedrock law of war principle i.e. that of distinction. Artificial or not on occasion, victory delaying or not on occasion, the theoretically bright line rule of distinction is of such a critical nature that any weakening of its authority must be resisted.

Pressures to diminish the principle of distinction would, among other harms, have an asymmetrical effect. Some temptations to blur the line of distinction are based upon a technological sophistication i.e. an ability to hit heretofore civilian objects but in such a way as to eliminate or minimize collateral damage. The trend in PGM as set out in this brief analysis of that phenomenon poses such a risk. Such a trend would tempt the technologically inferior victim, unable to avail itself of the precision means to reply in kind, to resort to retaliatory illegal methods of attack. This retaliation is unlikely to be precise or measured. Even if used against a technological equal, the attacks could degenerate quickly into a

³¹² Transmission facilities are a different issue. *See supra* Part V.G.

³¹³ ICRC COMMENTARY, *supra* note 16, para. 1979; Kalshoven, *supra* note 11; Hampson, *supra* note 51, at 49 (stating "the mere fact that an attack against a particular target does not cause excessive civilian casualties does not mean that the attack was lawful").

bloodier form of conflict. That is a predictable result of an on-going state of debilitating attacks on bloodless, but vital civilian targets.³¹⁴

VII. Conclusion

The concept of military objective in conventional international law is set out in Protocol I Article 52(2). That definition involves a two stage test requiring that an object by its nature, location, purpose or use make an effective contribution to military action and separately, that the destruction, capture or neutralization of the object offer a definite military advantage in the circumstance ruling at the time. The customary international law definition of military objective has become the same as the treaty based definition. Attempts to argue that the customary international law definition encompasses more than the conventional definition are unconvincing.

The conventional international law definition of proportionality is found in three places in Protocol I being Articles 51 (5) (b), 57 (2) (a) (iii) and 57^{ff}(2) (b). It requires a balancing of expected civilian losses against anticipated military advantage from any given attack set. The customary international law definition of proportionality may be somewhat different but the effects of any such difference are minimal.

³¹⁴ One can predict irresistible calls for conventional military retaliation in any number of scenarios. One example might be a continuous interference with stock markets month after month. The economic disruption of an affluent sophisticated society would likely prove intolerable to its citizens who might demand a military response of their government.

The language of Protocol I's definition of military objective permits, military requirements may dictate and state practice both by reservations and conduct in armed conflicts demonstrates the legality of considering military objectives in target sets. This aggregation is permitted but incidental civilian losses must also be estimated and weighed over the entire target set.

The inherent linkage between these two terms evidences a complementary relationship between military objective and collateral damage - that linkage is "military advantage". Because of various modifying factors, including the adjectives used, the time periods considered, the nature of the assessments and the degree of subjectivity, this linkage is weak, indirect and sporadic. The dynamics of the possible customary international law variations from the treaty based terms plus various controversies, initiatives and reforms confirms that there is a very general but not universal complementary relationship between military objective and the collateral damage part of proportionality.

While this complementary relationship poses some dangers, those dangers can be ameliorated by a strict application of at least two criteria in targeting decisions i.e. determination of military objective and a separate assessment of proportionality. Pressures to adopt any weapon, target, strategy or tactic based on an inverse relationship should be resisted because of the danger such a change would pose for the civilian population through a diminution of the fundamental law of armed conflict principle of distinction.